

Designing and Constructing Public Facilities

**Legal Requirements
Recommended Practices
Sources of Assistance**

Commonwealth of Massachusetts
Office of the Inspector General
Gregory W. Sullivan
Inspector General

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February 2003

Dear Public Official:

I am pleased to present this fifth edition of *Designing and Constructing Public Facilities*, which provides information and guidance to public officials undertaking public construction projects. This version of the manual has been updated to include recent judicial opinions, technical revisions, and current contact information for agencies and offices that are involved in the public construction process. You may download this manual from our website at www.mass.gov/ig or purchase additional copies from the State Book Store, Room 116, State House, Boston, MA 02133, (617) 727-2834.

This manual includes recommended best practices, such as effective project planning, designer selection, value engineering, and contract administration. Because the issue of contractor qualifications is central to best value construction contracting, this manual provides advice on ensuring that public construction contracts are awarded only to qualified contractors. Public officials must hold contractors accountable for their past performance to ensure that Massachusetts awarding authorities and taxpayers obtain high-quality construction services at competitive prices.

This manual is one component of my Office's capacity-building initiative to prevent fraud, waste, and abuse before they occur by providing public officials with the necessary skills and information to obtain best value in public procurements. My Office's Massachusetts Certified Public Purchasing Official (MCCPO) program, in its fifth year of successful operation, is another component of my Office's prevention strategy. The MCPPO program offers seminars for state and local officials, including an intensive, three-day seminar on Design and Construction Contracting. For additional information on the MCPPO program and my Office's other activities, I encourage you to contact us or visit our website.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan".

Gregory W. Sullivan
Inspector General

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Foreword

The Office of the Inspector General designed this manual for local and regional officials who manage or oversee public construction projects and need a ready reference on the legal and procedural requirements of Massachusetts design and construction procurement laws. The manual provides an overview of the design and construction process in lay terms. It identifies those steps in the process that are governed by specific statutory requirements and offers guidance and suggestions regarding those steps not governed by statute.

What's Included and What's Not

This manual focuses on design and construction projects undertaken by a city or town; an agency, board, district, or commission within a city or town; a regional district; a local housing authority; an independent local authority; or a county. This manual often uses the generic term “awarding authority” to refer to the public jurisdiction that has legal authority to undertake a project.

However, you should be aware that counties, local housing authorities, and other independent authorities are sometimes subject to different rules from those applicable to municipalities. This manual covers only the major differences in these rules. Projects funded in part by a state or federal agency may be subject to additional programmatic requirements established by the funding agency. Local ordinances, by-laws, and charters may also impose requirements that are unique to each jurisdiction.

What's Required and What's Not

We have tried throughout this manual to draw clear distinctions between required practices, which are mandated by law, and recommended practices, which you are free to accept, modify, or reject in light of each project's individual circumstances. For required practices, we have included references to the appropriate chapters and sections of the Massachusetts General Laws (M.G.L.) or the Code of Massachusetts Regulations (C.M.R.). If you have a question about a specific requirement, or if you are

dealing with a particularly complex or unusual situation, take the time to read the relevant statute or code. Copies of the Massachusetts General Laws are available in most municipal libraries or from your local attorney.

You should also be aware that some provisions of the law may be subject to differing interpretations. Although we have made every effort to interpret these requirements in light of relevant legislative history, case law, and administrative rulings, our interpretations represent the opinions of the Office of the Inspector General and are not legally binding.

The Office of the Attorney General has been responsible since September 1993 for ensuring that procurements of public design and construction contracts comply with Massachusetts public bid laws. The Division of Fair Labor and Business Practices within the Office of the Attorney General handles bid protests.

If you need information on legal requirements, consult your local attorney. Further assistance may be available from the various state agencies involved with the public construction process. These agencies are listed in Appendix A of this manual.

Reading this manual will not, by itself, make you an expert in public construction. A major public construction project should be administered by knowledgeable and experienced personnel. If your jurisdiction does not have such people on staff, consider hiring or contracting for the necessary expertise on a temporary basis for larger projects. Skimping on project management and oversight to save money is a shortsighted and often costly strategy.

The Massachusetts Public Purchasing Official Program

The Office's MCPPO program, a certification program for public purchasing officials, promotes professionalism and excellence in public procurement by preparing participants to make best value procurements for their jurisdictions. There are three core seminars: Public Contracting Overview, Supplies and Services Contracting, and Design and Construction Contracting. Each seminar spans three days and concludes

with a written examination. The Office delivers the seminars in various locations throughout the year. Public purchasing officials who complete the Public Contracting Overview seminar (a prerequisite for the other seminars) and at least one other seminar may apply for an MCPPO designation. The designation for which you are eligible is determined by the specific seminars you complete and your education and experience. The designations are as follows: MCPPO, MCPPO for Design and Construction Contracting, and MCPPO for Supplies and Services Contracting. Individuals with less experience may apply for an Associate designation. Once certified, purchasing officials must maintain their skills and knowledge to attain recertification every three years.

The MCPPO program was developed in consultation with public purchasing officials, including members of the Massachusetts Public Purchasing Officials Association, the Massachusetts Association of School Business Officials, and the City Solicitors and Town Counsel Association. The program meets standards set by national organizations: the American Council on Education recommends that institutions of higher education award undergraduate and graduate credit for completion of certain seminars; the National Association of State Boards of Accountancy has authorized the Office to offer Continuing Professional Education (CPE) credits; as an authorized member of the International Association for Continuing Education and Training, we offer Continuing Education Units (CEUs) for each seminar. School business officials who complete a seminar can earn Professional Development Points (PDPs), required under the state's Education Reform Act. The Office is also a registered provider of continuing education for the American Institute of Architects Continuing Education System (AIA/CES). AIA members who participate in MCPPO program courses will receive continuing education credit from the AIA.

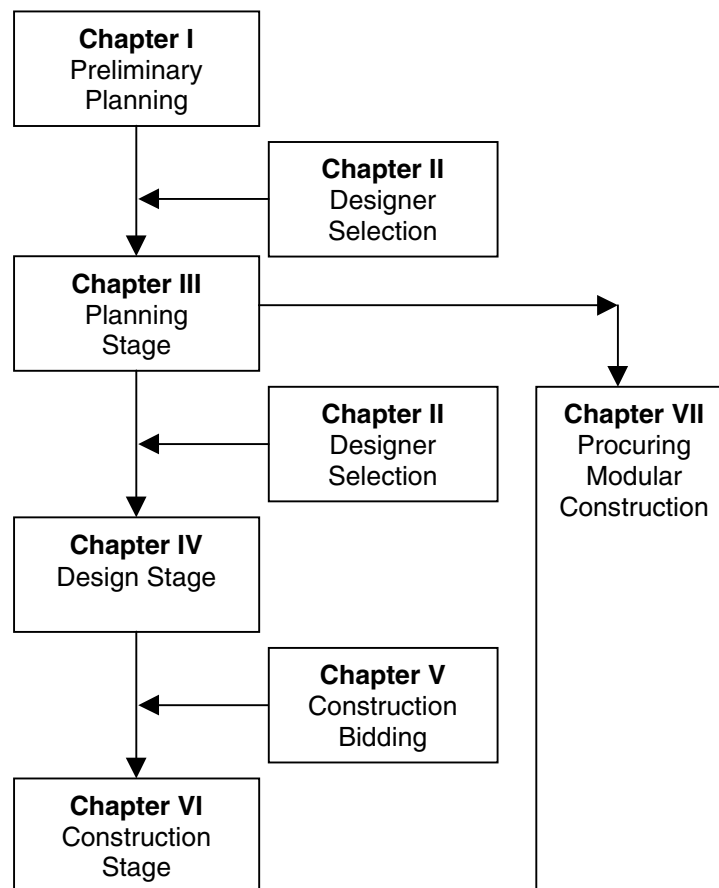
Additional information about the program can be obtained by calling (617) 523-1205 or visiting our website at www.mass.gov/ig.

Using this Manual

This manual is generally organized in the sequence of a typical construction project. The sequence begins in Chapter I which, after providing some general information

about the design-bid-build project delivery method, identifies preliminary planning issues concerning roles, staffing, and project controls – issues that should be addressed at the outset of a project to ensure success. Chapter II discusses designer selection – the procurement process for contracting with architects and engineers. Chapter II departs from the strict sequence because you may undertake a designer selection process at various points over the course of a construction project. The next three chapters proceed in sequence from the planning stage (Chapter III) into the design stage (Chapter IV), through construction bidding (Chapter V) and concluding with the construction stage, the period from commencement of construction through project closeout (Chapter VI). Chapter VII discusses modular construction, an alternative method of design and construction procurement that would typically begin after planning has been completed. (See Figure 1.)

Figure 1: Organization of This Manual



I. Public Construction in Massachusetts

Local awarding authorities in Massachusetts are responsible for a variety of construction projects, including schools, police and fire stations, roads, bridges, and wastewater treatment plants. The goal of public construction is to deliver public facilities that meet the needs of the citizens and public employees who will use them and that represent sound investments of tax dollars. High-quality, cost-effective design and construction services are key to achieving this goal on each public construction project.

The procurement and contracting procedures required by the public construction laws in Massachusetts differ in some respects depending upon whether the project entails “vertical” construction, such as a building, or “horizontal” construction, such as a roadway. Massachusetts laws have long required advertising and bidding of both vertical and horizontal public construction projects (referred to in this manual as “building” and “non-building” projects). Where appropriate and necessary, this manual makes clear the differences in requirements applicable to the different types of projects.

Design-Bid-Build Project Delivery

The design and construction contracting process for public construction projects in Massachusetts typically involves three stages: planning, design, and construction. In the planning stage, project requirements are defined and often documented in a study, environmental report, or other planning document. The design stage results in a complete set of plans and specifications describing the project to be built. In the construction stage, bids are solicited on the completed design, and the selected contractor completes the construction. This project delivery method is often referred to as the design-bid-build method.

The design-bid-build project delivery method for public construction involves at least three players: the public owner, the designer, and the contractor:

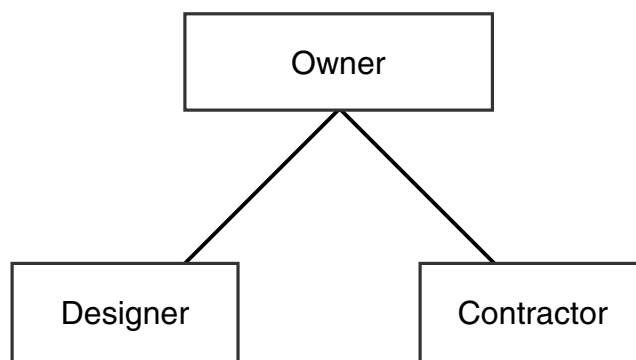
The **owner** is responsible for defining the project scope, budget, and schedule; procuring and managing the project design and construction services; paying for the

project, which typically involves financing; and operating and maintaining the completed facility.

The **designer** is the architect or engineer responsible for assisting the owner in developing the project scope, budget, and schedule and, within those parameters, preparing the detailed plans and specifications¹ that define the facility to be constructed. The designer may subcontract specialized portions of the design work, such as structural or mechanical design components, to subconsultants. The owner may decide to expand the designer's duties to include oversight of the contractor's performance during the construction stage of the project.

The **contractor** is responsible for providing the labor, materials, and equipment to construct the project in accordance with the plans and specifications. On building projects, major components of the project are typically performed by subcontractors working under the contractor's direction.

Under the design-bid-build method, the designer and the contractor each contracts separately with the owner in an arrangement that provides checks and balances for the project.



¹ Plans consist of the construction drawings; specifications provide a detailed written description of the construction work, including dimensions and materials, represented in the plans.

Design-Build and Other Alternative Project Delivery Methods

Certain project delivery methods do not fit within the design-bid-build process described in this chapter and cannot be used for public construction projects without the prior approval of the Legislature. One of the more common examples is design-build. On a design-build project, the owner executes a single contract with a single entity – e.g., a design-build firm or joint venture – for design and construction of the project. Design and construction are combined into a single stage with no separate bid for construction based on 100 percent complete plans and specifications. Instead, design-build contracts are typically procured through a request for proposals process based on conceptual plans whose level of completion can vary from five percent to 50 percent.

There is widespread agreement that design-build is appropriate only in limited circumstances, principally for those projects for which the owner can establish effective and measurable performance criteria and express warranties. Design-build proponents argue that when appropriate, design-build accelerates construction schedules and reduces project costs by allowing the design and construction stages to overlap, eliminating the time required to solicit competitive construction bids, facilitating communication and coordination between the designer and the contractor, and allowing the design-build team flexibility to select the construction materials and methods that will best meet the requirements set forth in the conceptual plans.

The risks of design-build stem from the changed role of the designer and the incomplete design underpinning the design-build contract. In a design-bid-build project, the scope of the designer's contract often includes monitoring the progress of construction on behalf of the owner to ensure that the final product comports with the detailed plans and specifications for the project. In a design-build project, however, the designer is a member of the contractor's team. Under this contractual arrangement, the owner cannot rely on the designer to detect and report construction defects, and must therefore invest in independent oversight to monitor and ensure the project quality.

Cost escalation is also a major risk. The owner may be vulnerable to price increases stemming from disputes with the design-builder over the final building systems and

materials. In the absence of complete plans and specifications, the design-builder's price may include a contingency as protection against future disputes with the owner.

Because the design-build project delivery method requires significantly increased oversight to forestall project cost escalation and quality problems, the public construction laws in Massachusetts do not permit their use without special legislative authorization, with two exceptions: modular buildings and energy management services. These exceptions are discussed in Chapters II and V of this manual.

Alternative methods that require the owner to contract for construction work without a completed design may save time but entail increased risks. Before seeking legislative authorization to use an alternative project delivery method for a public project, give careful consideration to your jurisdiction's capacity and willingness to invest in the additional project oversight necessary to mitigate the higher risks inherent in alternative construction methods. Any major public construction project requires a substantial investment in planning, project management, and oversight in order to safeguard the owner from excess costs, schedule delays, and design and construction problems. Even with procedural safeguards such as advertised competition, alternative project delivery methods require a higher investment in professional expertise and ongoing monitoring. The additional planning and oversight required to mitigate the risks of these methods can quickly cancel out any schedule advantages they offer.

Before You Begin: Preliminary Planning

A construction project is an inherently complex and risky undertaking. The unique attributes of each project make the construction process far less predictable – and therefore more risky – than the procurement process for most other types of supplies and services. You can reduce your jurisdiction's exposure to risk by instituting workable procedures for project oversight and record-keeping at the outset of the project. You should also ensure that all employees who will communicate with the designer or the contractor understand the limits of their authority to make decisions on behalf of your jurisdiction.

Planning and Staffing for Project Oversight

Contracting out the design and construction of a project does not absolve you as the public owner from responsibility and accountability for the project. To protect your jurisdiction's interests, it is essential that you plan and provide for sufficient and effective supervision and oversight of the project by experienced staff and/or consultants at every stage of a public construction project. While some jurisdictions have traditionally relied on temporary or permanent volunteer building committees to oversee project design and construction, it may be unrealistic to assume that a part-time, volunteer committee will have the time and expertise to provide the necessary oversight functions.

Early in the planning process is the optimal time to develop an oversight plan that defines the roles and responsibilities of those who will supervise the project. On major projects, there will often be three key people supervising the work: the project manager, the designer or construction manager, and the clerk of the works. On smaller projects, some of the oversight functions may be combined so that only one or two key supervisory staff are needed.

The project manager. The project manager is the official or firm designated by the owner to serve as the focal point of responsibility and accountability on the project from the study and design stages through construction completion. Even if the project will be under the supervision of a committee or board, such as a town building committee, all communication between the jurisdiction and any other party should be channeled through the project manager. In addition to coordinating the work of the project participants, the project manager closely monitors the project budget and schedule, and maintains a central file of project records. The scope of the project manager's duties and authority will vary depending on the needs of the jurisdiction and the complexity of the project.

We recommend that you hire or contract with a full-time project manager on large or complex projects. Consider hiring a project manager on a temporary basis if your

jurisdiction lacks available staff with the necessary expertise.² The project manager should, of course, have fiscal, procurement, and construction experience. If you contract with a project management firm for these services, the project manager will typically serve as the construction manager during the construction stage of the project.

The construction manager. The construction manager typically coordinates and oversees the construction process, monitors the construction schedule and budget, reviews and approves contractor submissions, inspects completed work, and approves contractor payments. Some jurisdictions contract with the project designer for construction management services during the construction stage of the project; others hire or contract with a professional construction manager rather than including construction management services in the design contract. Bear in mind that the skills required to design a building or highway project are very different from those required to manage and oversee the construction stage of that project. If you plan to contract with a single design firm for both design and construction management services, make sure that you focus on both sets of skills in evaluating designers for the project.

The clerk of the works. The clerk of the works serves as the owner's representative at the project site. This individual's general function is to observe and record the progress of the construction. For major projects, the clerk of the works should be a full-time employee or contractor with substantial construction experience. (If you are contracting with a construction management firm, the firm may provide a site representative who functions as a clerk of the works.) This individual's job responsibilities will generally include:

- observing the progress of construction;
- monitoring contractor staffing, equipment, and materials deliveries;
- coordinating the project schedule; and

² Note that the function and responsibilities of the public owner's project manager differ from those of the designer's project manager, who is responsible for managing the design contract on behalf of the project designer.

- on-site project record-keeping, including preparation of daily logs and progress reports.

The early planning stage is also the time to decide how to manage the relationships among the various parties. Your objective is to complete the project successfully – that is, to build a high-quality facility that meets your needs, on time and within your budget. Although the construction field has traditionally been prone to conflict and litigation, you can take steps to reduce these risks. A well-written contract is the most important protection against unnecessary disputes. But even with a well-written contract, you have to oversee the construction process to increase the likelihood of a successful project.

Partnering is one approach to construction project management that is gaining increasing acceptance in the construction field. This approach seeks to avoid conflict, and to address conflicts quickly when they arise, through the use of specific team-building and dispute resolution techniques. Partnering requires all parties to consider the interests of the other parties and to work toward achieving mutually agreed-upon objectives. It does not, however, require you to give up or undercut your jurisdiction's interests in any way.

Project Record-Keeping

Good record-keeping is essential to efficient and effective contract administration and oversight. Thus, before embarking on the project, it makes sense to institute a centralized project record-keeping system that will ensure thorough, accurate documentation of the project from the planning stages through construction completion. Responsibility for maintaining the project records should be assigned to the project manager. Examples of project records that must be maintained include all project-related meeting minutes, contracts and amendments, programs and feasibility studies,

plans and specifications, shop drawings,³ change orders,⁴ invoices and payment requisitions, correspondence, as-built drawings, and warranties.

Authority to Contract

Any contract signed by an individual who lacks the authority to bind your jurisdiction will be legally unenforceable. If you do not know who within your jurisdiction is authorized to enter into contracts, or what kinds of contracts are permissible, you should review your jurisdiction's enabling legislation, charter, or local rules; you should also consult your local attorney.

³ Shop drawings are detailed drawings of specific construction components or systems called for in the plans and specifications. The general contractor submits shop drawings to the designer for approval.

⁴ Change orders are owner-approved modifications to the construction contract that affect the contract scope, price, and/or schedule.

II. The Designer Selection Process

Construction projects typically require the services of registered architects, engineers, and other professional consultants to plan the work that will ultimately be carried out by construction contractors. The term “designer” is used to refer to the individuals or firms hired to do the architectural and engineering work for a project. In this manual, the term also includes consultants hired for preliminary planning (including the preparation of programs, feasibility studies, and environmental reports), for value engineering reviews, and for construction supervision.

In the life cycle of a public facility, you may contract with designers for different services at different times. For example, you might contract with:

- a designer to do early work on a feasibility study;
- a value engineering specialist to review the study in order to recommend potential changes to save money or improve the facility’s function;
- another designer to develop design and bid documents;
- a value engineering specialist as the design is being developed to review the design development documents;
- a construction manager to provide construction management services; and
- various architects and engineers in subsequent years after the facility is opened to study needed renovations, repairs, and, potentially, replacement.

This chapter presents information on designer selection. Subsequent chapters will cover the sequence of project development from planning through construction project closeout.

Selecting a qualified designer is essential to the success of a construction project. For building projects, state law requires a designer selection process that is aimed at obtaining high-quality design services for public buildings, while ensuring that qualified designers have the opportunity to compete for public business through a fair, open process. These procedures are found in M.G.L. c. 7, §§38A½-O, the designer selection

law. For non-building or public works projects, the selection of designers is not subject to the designer selection law.⁵

The first section of this chapter sets out the requirements of the designer selection law for contracting with designers to work on building projects. The chapter concludes with a discussion of procurement of design contracts for non-building public works projects and design-related contracts subject to M.G.L. c. 30B.

The Designer Selection Law For Building Projects >\$100,000

The designer selection law applies to design services contracts for any building construction, reconstruction, alteration, remodeling, or repair work estimated to exceed \$100,000. If you do not know the estimated construction cost, as is often the case in the preliminary planning stages of a project, we recommend that you follow the Designer Selection Board's "Designer Selection Guidelines for a City or Town Building Project" (provided in Appendix C of this manual). These guidelines state that the designer selection law also applies when the design fee is estimated to cost \$10,000 or more.

Even if a building is only a small part of a project, the project is still a building project. A \$1 million project to build an outdoor ice skating rink would not be subject to the designer selection law, but if the project included a \$100,000 building, the entire project would be subject to the designer selection law.

Design services include the following services in connection with a public building project: preparation of master plans, feasibility and other studies, surveys, soil tests, cost estimates and programs; preparation of drawings, plans and specifications, including schematic drawings and preliminary plans and specifications; supervision or administration of a construction contract; and construction management and scheduling. [M.G.L. c. 7, §38A½(b)]

The designer selection law that applies to municipalities is found in M.G.L. c. 7, §38K. State-funded housing authorities are subject to designer selection procedures adopted by the Department of Housing and Community Development; a brief summary of these

⁵ Design contracts for non-building public works contracts are discussed on page 34.

procedures is provided later in this chapter.⁶ Other local awarding authorities, such as counties, are subject to the jurisdiction of the state Designer Selection Board (DSB), which also selects designers for state building construction projects. The DSB is an independent board, the majority of whose members are architects and engineers, that was created to ensure the professionalism of the designer selection process and to insulate the process from political influence. The DSB selects designers through a formal, advertised process outlined in M.G.L. c. 7. Information on the DSB's designer selection process may be obtained from the DSB's website at www.mass.gov/cam/about/ov_designer.html.

Exempt design contracts for building projects estimated to cost more than \$100,000. Contracts for modular buildings are not subject to the designer selection law. You may procure contracts for the fabrication or installation of modular buildings using a request for proposals process in accordance with the provisions of M.G.L. c. 149, §44E. (Chapter VII of this manual provides detailed information on the statutory requirements for procuring modular buildings.)

Contracts for energy management services that may include improvements to a building are not subject to the designer selection law and may be procured using a request for proposals process in accordance with the provisions of M.G.L. c. 25A, §11C. Information on energy management services contracting may be obtained from the state's Division of Energy Resources. (See Appendix A for information on contacting the Division.)

Contracts for the design of a building that is appurtenant to a sewer, water, or highway system, and is required as an integral part of that system, are exempt from the designer selection law. [M.G.L. c. 7, §39A(g¹/₂)]

Design contracts for building projects estimated to cost \$100,000 or less. To select designers for smaller building projects – those whose estimated construction

⁶ Federally funded housing authorities are required to follow U.S. Department of Housing and Urban Development guidelines, which also require compliance with applicable state law.

cost is \$100,000 or less – we recommend soliciting qualifications and price information from at least three design firms.

Who Can Perform Design Services

Design services generally require the participation of registered architects, landscape architects, or engineers. In such cases, if the designer is an individual, he or she must be registered in the appropriate discipline. If the designer is a partnership, a majority of the partners must be registered in the appropriate discipline. If the designer is a corporation, sole proprietorship, joint stock company, or other entity, the chief executive officer, the person in charge of the project, and either a majority of directors or a majority of the ownership interest must all be registered in the appropriate discipline. [M.G.L. c. 7, §38A½(b)(iii)]

The designer selection law also applies to contracts with consultants who are not architects and engineers if the consultants provide any of the design services listed above. Design services such as the preparation of a study evaluating alternatives and recommending solutions involving work on a building may be undertaken by someone other than an architect or engineer. For example, a municipality may hire an industrial hygienist to inspect school buildings for exposed asbestos. The industrial hygienist will generally prepare a study, survey, or program and a cost estimate for the asbestos removal. Because these activities constitute design services for a building alteration or repair, the designer selection law applies to the selection of the industrial hygienist.

Using the Same Designer for Study and Subsequent Design Services

Allowing study consultants to recommend the scope and budget of design contracts in which they have a financial interest can undermine sound planning and invite excessive project costs. For this reason, the designer selection law permits municipalities to contract with the same designer for both the study and the subsequent design only if they obtain an independent review of the study before proceeding to the design stage. The reviewer, who must be a knowledgeable and competent individual or firm with experience on similar projects, must evaluate the reasonableness and adequacy of the

study. [M.G.L. c. 7, §38H(i)] The reviewer should have no connection with either the study consultant or your jurisdiction and no vested interest in the study results.

The procurement of a contract for an independent review is not subject to the designer selection law, but is subject to M.G.L. c. 30B. In general, the fee for an independent review will be less than \$25,000; if so, you may use an informal quotation solicitation process to select a qualified independent reviewer.⁷

A value engineering review of a study can be used to satisfy the independent review requirement. A contract for value engineering must be procured using the designer selection law procedures. (Chapter III provides additional information on value engineering.)

Note that even if you want to use the independent review option, it is advisable to conduct a separate advertised competition for the subsequent design services.⁸ If the study designer is selected, a satisfactory independent review must be performed prior to contracting for the design services.

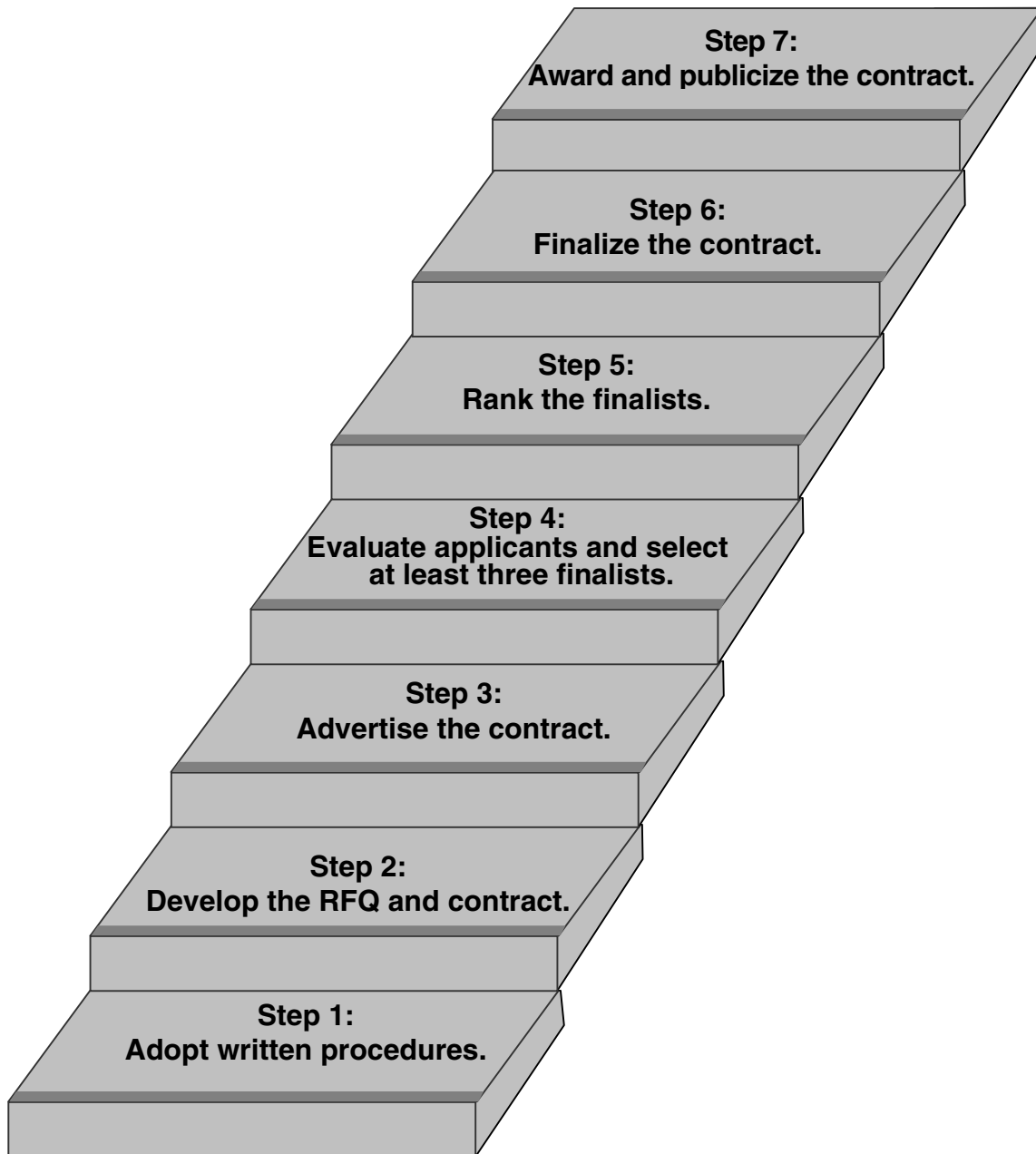
The Basic Steps

This section describes the basic steps in the designer selection process for municipal building projects subject to the designer selection law. Figure 2 on the following page illustrates these steps.

⁷ The Inspector General's manual on *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property* contains detailed information on the requirements of M.G.L. c. 30B. You may download this manual from our website at www.mass.gov/ig or order it from the State Book Store.

⁸ See *LeClair v. Norwell*, 430 Mass. 328 (1999).

Figure 2. Designer Selection Law: The Basic Steps



Step 1: Adopt written procedures.

Municipalities must adopt written procedures for selecting designers on projects subject to the designer selection law. [M.G.L. c. 7, §38K(a)] These procedures must be adopted before you select a designer for any specific project. Most cities and towns have already developed and adopted such procedures. Even if you have no projects planned for the immediate future, adopting designer selection procedures now will save you time when you do embark on a building project. Written procedures also foster compliance with the designer selection law and provide useful information to potential applicants for design contracts. Once adopted, you can use the procedures for all of your subsequent building design contracts. To assist you in developing designer selection procedures, the Office of the Inspector General has developed Model Designer Selection Procedures for Municipalities that can be downloaded from the Office's website at www.mass.gov/ig.

As noted earlier, the DSB publishes guidelines for municipal designer selection (provided in Appendix C of this manual). Municipalities may deviate in minor respects from these guidelines, which are based on the state's designer selection process, provided that the process adheres to the purposes and intent of the designer selection law, M.G.L. c. 7, §§38A½-O. Exactly how much deviation is permitted at the local level is a matter subject to legal interpretation. If you do wish to deviate from the guidelines, we recommend that you consult with your local attorney. In tailoring the DSB guidelines for local use, pay particular attention to the following areas.

Applicability. Specify whether the designer selection procedures will be used for only those building projects covered by the designer selection law, or whether they will also be used for other types of local construction projects. Specify whether all agencies and boards within your jurisdiction are subject to the procedures, or whether some agencies (for example, a school committee) will be subject to other procedures.

Advertising. The advertising requirements discussed in Step 3 are mandatory. It would be useful to potential applicants to specify in your jurisdiction's designer

selection procedures the names of the newspapers where the notices will be published.

Selection of finalists. Specify who will be responsible for reviewing the applications and selecting and ranking the finalists. On state projects, the DSB performs this function. The use of a designer selection committee is not required at the local level, although we do recommend its use for larger projects. Having a committee guards against favoritism or personal bias that can result when a single person is asked to make a subjective judgment. Including trained professionals in addition to lay people on the committee helps ensure that evaluations take account of standards and experience in the design profession.

If a committee is to be used, specify who will appoint its members and whether it will be a standing committee for all design projects or an ad hoc committee selected for each project. Also note that committee members who have financial or other connections to a design firm applying for a contract may not participate in the selection process for that contract. [M.G.L. c. 268A]

Fee negotiations with top-ranked finalist. Specify who will select the top-ranked finalist from among the finalists and conduct the fee negotiations if the fee is not set (as discussed on page 25).

Emergencies. Specify the procedures to be used in an emergency and who will have the authority to invoke them. The law permits expedited designer selections in case of emergency. [M.G.L. c. 7, §38J] An emergency is defined as a situation where expedited action is necessary to protect the health or safety of people or to meet deadlines imposed by a court of law or a federal agency. Note that not every urgent situation meets the statutory definition of an emergency. We recommend that your emergency procedures identify who has authority to determine that an emergency exists and provide for such competition as is reasonably possible under the emergency circumstances.

Formal adoption of the designer selection procedures requires appropriate action at the jurisdiction level, as determined by your local ordinances or by-laws. Your local attorney can provide advice regarding the specific actions required.

Designer Selection Procedures for State-Funded Housing Authorities

State-funded housing authorities are subject to detailed designer selection procedures developed by the state Department of Housing and Community Development (DHCD) under an exemption granted every two years by the state Designer Selection Board. The highlights of the DHCD procedures for awarding design contracts subject to M.G.L. c. 7 are summarized below.

Design fees for all DHCD-funded projects are set by DHCD prior to initiating the designer selection process. DHCD requires state-funded housing authorities to advertise design projects subject to the designer selection law in the *Dodge Reports* and newsletters or bulletins of relevant professional associations and the State Office of Minority and Women Business Assistance (SOMWBA), as well as the *Central Register* and a newspaper of general circulation, at least two weeks before the application deadline. Applicants must have their Master File Brochures on file at DHCD at the time that they submit an application for a specific design project. (The Master File Brochure contains a summary of the designer's qualifications and experience and must be updated yearly.) Applications are sent to the housing authority, which reviews each application for completeness before forwarding the applications and other procurement materials to DHCD.

DHCD's independent nine-member Designer Selection Committee (DSC) reviews the application packages and selects three to five finalists based on the required submissions, predefined criteria, and any information provided by the state-funded housing authority. Design contracts with estimated fees of more than \$100,000 are subject to specific minority and women-owned business participation requirements established by DHCD. State-funded housing authorities have the option of setting up a local or regional screening committee to interview and rank the finalists selected by the DSC. Otherwise, the DSC ranks the finalists for the state-funded housing authority. The housing authority must interview the first-ranked finalist and provide a written explanation if the first-ranked finalist is not selected.

DHCD has established modified designer selection procedures for the following types of design contracts:

- design contracts for projects that receive funding from both state and federal sources,
- design contracts for building projects whose estimated construction cost is less than \$100,000 or that entail design fees of less than \$10,000, and
- emergency design contracts.

DHCD provides extensive training and technical assistance to state-funded housing authorities on contracting for design and construction services. DHCD also provides a standard design services contract that must be used for DHCD-funded projects. Appendix A includes information on how to contact DHCD.

Step 2: Develop the RFQ and contract for design services.

Define the project scope. The first step in selecting a designer is to decide what you want the designer to do. Do you simply want the designer to tell you what repairs your 1910 fire station needs, or do you also want the designer to study the feasibility of renovating it to house administrative offices? Such decisions need to be made before you advertise for design services. The written scope of services you include in the request for qualifications (RFQ) must conform substantially to the contract that you will ultimately sign. The scope of services may combine design work on different facilities or in different parts of one facility. If you are considering allowing the study designer to compete for the subsequent design contract, you should make this clear in the project scope.

You should also consider whether or not it makes sense to contract with the designer to provide construction management services on the project after the design stage is completed. In making this decision, keep in mind that the skills required to design a building or renovations to a building are very different from the skills required to manage a building construction or renovation project. If you plan to contract with a single design firm for both design and construction management services, your evaluation process should focus on both sets of skills. Alternatively, you could hire or contract with a professional construction manager rather than including construction management services in the design contract. Under this scenario, the designer would develop the design and prepare the final plans and specifications; the construction manager would coordinate the construction process, monitor construction schedules, and approve contractor payments.

Even where you contract separately with a construction manager, you will often require the designer to retain some involvement with the project through its completion. The degree of contract oversight that the designer will exercise is a decision that you must make for every project. It is critical to your interests as owner to define the specific tasks for which the designer will be responsible during the construction phase, and to specify who will be responsible for any tasks that are not included in the designer's contract.

Generally speaking, the scope of work should include defined deliverables, and a timetable for producing each deliverable. By including a schedule for deliverables, you help ensure that the design progresses according to your expectations and the project schedule. If you plan to conduct a value engineering review, this review should be incorporated into the schedule. (Value engineering is discussed in the next chapter.)

Draft the evaluation criteria. The RFQ should state all the criteria that will be used to evaluate designers submitting applications for the project. We recommend that you use the following criteria to evaluate applicants for building design contracts:

Experience	Ensure that the firm and the specific individuals proposed for the job have sufficient and appropriate experience on projects similar to the proposed project.
Quality of work	Contact the owners of other projects on which the firm has worked and ask them to evaluate the firm's performance as a designer, construction manager, or both. You may use your own jurisdiction as a reference, provided that you have a reasonable basis for evaluating the applicant's past performance.
Public sector knowledge	If the scope of work includes preparation of plans and specifications and assistance during the bidding and construction stages, ensure that the firm is familiar with Massachusetts public construction laws and procedures.
Professional registrations	Ensure that the firm has the professional licenses required for this project.
Subconsultants	Review and rate the qualifications of key subconsultants who will be employed by the designer.
Capacity	Ensure that the firm has the capacity to undertake your project in a timely manner, based on its size and the number and volume of current projects.

Prepare an application form. You must ask all designers to provide you with the same information. [M.G.L. c. 7, §38K(a)(ii)] The DSB has developed a standard form for use on municipal projects (available from the DSB's website at www.mass.gov/dcam/about/ov_designer.html). Other municipalities have chosen to

develop their own standard RFQs. At a minimum, the application form should reflect your evaluation criteria and contain the following information:

- Names and addresses of all partners, officers, directors, and owners – i.e., persons with an ownership interest in the firm of more than five percent.
- Names and registration certification numbers of those officers, directors, and owners who are registered architects or professional engineers.
- List and contact information for all public design projects undertaken in Massachusetts within the past five years. It is important to ask for the complete list rather than just selected examples that could exclude problem projects.
- List and contact information for all current design projects.
- If the applicant is a joint venture (two or more independent firms applying together), all required information should be submitted for each partner in the venture.
- Certification that the applicant meets the statutory definition of designer or construction manager, as discussed earlier in this chapter. (This certification is not required for preparation of studies, surveys, soil testing, cost estimates, or programs.)
- Names, registration numbers, and résumés of key personnel who will be assigned to this project, including the designer's staff and all subconsultants for those categories of work specified in the public notice.
- A statement in which the applicant certifies under penalties of perjury that the information provided is correct. [M.G.L. c. 7, §38E]

Note that the designer selection law does not allow you to require a fee proposal in the application.

Set the fee or not-to-exceed fee limit. You need to decide whether to set the fee for the design contract or to set a not-to-exceed fee limit and negotiate the fee after selecting a designer. If you set the fee, the fee will be binding for all applicants. If you plan to negotiate the fee, the not-to-exceed fee limit will provide a cost ceiling for the fee negotiations. By ensuring that the design fee or not-to-exceed fee limit for the fee negotiations is reasonable and realistic, you will increase the likelihood of obtaining high-quality, cost-effective design services.

Under the designer selection law, the design fee contained in the contract must be stated as a fixed dollar amount; it may not be expressed as a percentage of the construction cost. [M.G.L. c. 7, §38G(c)] In establishing the design fee, you should take into consideration not only the estimated construction cost, but also the nature and complexity of the project. The DSB's "Designer Selection Guidelines for a City or Town Building Project" contain useful information on establishing reasonable design fees. A copy of the DSB guidelines is provided in Appendix C of this manual. The contract can provide for equitable adjustments if the scope of services is changed. [M.G.L. c. 7, §38G(c)] This means that if, as the contract proceeds, it becomes necessary for the designer to do more or less work than originally contemplated, the fee can be increased or decreased. The adjustment is often determined by a formula set forth in the contract (for example, an hourly rate for principals or other employees). But if the amount of work – and, thus, the fee – is increased substantially, it may make sense to advertise and award a new contract, based on a new scope of services.

Develop the contract terms. It is important to develop the design contract before you solicit applications from designers. By making the key decisions concerning the contract scope, terms and conditions, and design fee early in the process, you will increase the likelihood of attracting applicants with the requisite experience. If you do not already have a standard contract for design services, ask your local attorney to develop one. The contract used by the state Division of Capital Asset Management (DCAM) is a good model for local awarding authorities. Model contracts issued by the American Institute of Architects (AIA) are commonly used, but we do not recommend their use for public projects. The AIA contracts are written to protect the designer's interests and contain insufficient protections for your jurisdiction. Moreover, they do not contain some statutorily required provisions for public contracts in Massachusetts. Once you have developed a standard contract, you can use it over and over again with only minor modifications for each project. The sidebar on the following pages provides more detailed information on the components of the design contract.

The Design Contract for Public Building Projects

These are some essential elements that every design contract subject to M.G.L. c. 7 must contain:

Scope. The contract must clearly define the scope of services to be performed, including a list of all deliverables and other work products to be produced by the designer.

Key personnel. The qualifications of the designer's proposed project team – particularly the designer's proposed project manager, senior staff, and subconsultants – should be a key factor in the selection process. To prevent the designer from substituting less experienced personnel after the contract is awarded, the contract should specify the names and time commitments (for example, staff to be committed to the project on a full-time basis) of the key personnel listed in the designer's application. The contract should include a provision stating that no substitutions may be made without your jurisdiction's written approval.

Payment terms. Most designers, particularly on larger projects, will expect to receive periodic payments. It is preferable to link these payments to progress, such as the completion of designated milestones, rather than simply paying a certain amount each month. The contract should also specify who will bear the cost of redesign if the plans are unsatisfactory or if the construction bids exceed either the cost estimate or the available appropriation. In addition, the contract must prohibit the designer from receiving any extra payments for additional work that should have reasonably been anticipated by the designer. [M.G.L. c. 7, §38H(j)]

Errors and omission insurance. Errors and omission insurance, which protects the awarding authority in the event of errors or negligence on the part of the designer, is required on all design work other than planning studies. [M.G.L. c. 7, §38H(f)] The minimum amount of required insurance is 10 percent of the estimated construction cost or \$1 million, whichever is less. The awarding authority may choose to increase this requirement. Generally, the insurance is obtained by the designer, although some awarding authorities may find it less expensive to obtain the insurance themselves on large projects. The decision concerning who will pay the insurance premiums should be made before a final fee is negotiated. If you are requiring the designer to obtain all or a portion of the insurance coverage, the designer must provide you with a certificate of insurance coverage before you award the contract. You may also require that the designer's subconsultants obtain insurance; if you do so, you should require each subconsultant to provide a certificate of coverage before you award the contract.

Other statutory requirements. State law contains several certifications and requirements relating to non-collusion in the submission of applications and to financial reports that the designer must file. [M.G.L. c. 7, §38H(e)] The following provisions must be included in the design contract:

- Certification that the designer or construction manager has not given, offered or agreed to give any person, corporation or other entity any gift, contribution, or offer of employment as an inducement for, or in connection with, the award of the contract for design services;
- certification that no consultant to or subcontractor for the designer or construction manager has given, offered or agreed to give any gift, contribution, or offer of employment to the designer or construction manager, or to any other person, corporation, or entity as an inducement for, or in connection with, the award to the consultant or subcontractor of a contract by the designer or construction manager;
- certification that no person, corporation or other entity, other than a bona fide full-time employee of the designer or construction manager, has been retained or hired by the designer or construction manager to solicit for or in any way assist the designer or construction manager in obtaining the contract for design services upon an agreement or understanding that such person, corporation, or other entity be paid a fee or other consideration contingent upon the award of the contract to the designer; and
- certification with respect to contracts which exceed \$10,000 or which are for the design of a building for which the budgeted or estimated construction costs exceed \$100,000 that the designer has internal accounting controls as required by M.G.L. c. 30, §39R(c) and that the designer has filed and will continue to file an audited financial statement as required by M.G.L. c. 30, §39R(d).

Note also that any person contracting with a governmental body must certify in writing that he or she has complied with state tax laws, reporting of employees and contractors, and withholding and remitting of child support. [M.G.L. c. 62C, §49A]

Right to use documents. It is in your interest to include a provision giving your jurisdiction the right to use all design documents prepared by the designer. We recommend that your design contract include a provision similar to the following provision contained in the Commonwealth's design contract:

The Commonwealth shall have unlimited rights, for the benefit of the Commonwealth, in all drawings, designs, specifications, notes and other work developed in the performance of this contract, including the right to use same on any other Commonwealth projects without additional cost to the Commonwealth; and with respect thereto the Designer agrees and hereby grants to the Commonwealth an irrevocable royalty-free license to all such data which he may cover by copyright and to all designs as to which he may assert any rights or establish any claim under any patent or copyright laws. The Designer shall not be responsible for changes made in the documents without the Designer's authorization, nor for the Division's use of the documents on projects other than the Project, unless this is a contract for design services for a master plan or prototype.

Step 3: Advertise the contract.

You must publish notices in a newspaper of general circulation in the area in which the project is or will be located, and in the *Central Register* inviting applications from interested designers. The *Central Register* is a weekly publication issued by the Secretary of the Commonwealth containing a variety of notices related to public construction projects and real property transactions in Massachusetts. The necessary forms and information for publishing notices in the *Central Register* are available from the Secretary of the Commonwealth's website at www.mass.gov/sec. The notice must be published at least two weeks before the deadline for receiving applications. [M.G.L. c. 7, §38D]

The published notice must contain detailed project information. The following list may be useful as a guide to preparing the notice:

- Describe the overall project (including the estimated construction cost, if known), the scope of the specific designer services you are seeking, and the time frame within which the project is to be completed. [M.G.L. c. 7, §38D(b)(i)]
- If a study or program has already been completed, indicate when and where it is available for inspection. If no study or program is available, say so. [M.G.L. c. 7, §38D(b)(ii)]
- List any specific professional qualifications required for the design contract. [M.G.L. c. 7, §38D(b)(iii)] For example, if you plan to contract with the designer for construction management services, specify the required construction management qualifications and experience. Note that under state law, a registered architect must prepare plans and specifications involving any building whose size equals 35,000 cubic feet or more. [M.G.L. c. 112, §60L]
- Specify any categories of work for which you will require the designer to list the subconsultants he or she plans to use. [M.G.L. c. 7, §38D(b)(iv)] This information is particularly important for those projects where a significant portion of the work will be done by subconsultants and where the awarding authority will want to evaluate the qualifications of the subconsultants as well as the designer.
- If a briefing session will be held for potential applicants, indicate when and where. [M.G.L. c. 7, §38D(b)(ii)] While not required, a briefing session is often useful on large or complex projects to provide an opportunity for potential applicants to ask questions and learn more about the project.

- State whether the designer's fee has been set and the amount, or whether the fee is to be negotiated. [M.G.L. c. 7, §38D(b)(v)]
- Indicate how to obtain the RFQ, where and when to submit the completed applications, and whom to contact for further information. (Note that this is the only item *not* required by law.)

Step 4: Evaluate applicants and select at least three finalists.

The applications should be evaluated by a designated local official or by a designer selection committee. The law requires you to treat all applicants uniformly and fairly: for example, you should solicit the same information from each applicant and apply the same evaluation criteria and methods to each application. At least three finalists must be selected from among the applicants. [M.G.L. c. 7, §38K(a)(ii)]

Local jurisdictions can request that the DSB review applications and select finalists for them. [M.G.L. c. 7, §38K(c)] Jurisdictions considering this approach should contact DSB to determine the time and other requirements of the DSB to conduct such a review.

Step 5: Rank the finalists.

After you have shortlisted the pool of applicants to at least three finalists, you should focus on the finalists' past performance. The owners of the projects designed by the finalists are the best source of information about the designers' skills and past performance. You may seek additional information from the finalists or request that they appear before the selection body, provided that you treat all finalists equally. [M.G.L. c. 7, §38K(a)(ii)] For example, if you give one finalist the opportunity to make an oral presentation, you must give all finalists that opportunity.

If you plan to conduct interviews, decide in advance what information you expect to obtain and which of the design firms' key personnel you wish to interview. Be careful to ensure that you will interview key personnel who will work on your project. And remember that while an interview that showcases a designer's marketing or communication skills may reflect the designer's ability to communicate with local boards and committees, an interview is not likely to reveal the information you need most about

the designer's capabilities. For this reason, we encourage you to rely primarily on project references to evaluate designers' past performance.

After evaluating the finalists, you should rank them in order of qualifications and document the reasons for the rankings. After the finalists have been ranked, a designated local official or committee chooses one of the finalists. This almost always should be the top-ranked finalist. In rare cases, you may have a valid reason to skip the top-ranked finalist and choose one of the other finalists for negotiation; in such cases you should clearly document the reasons for such a decision in the procurement file. [M.G.L. c. 7, §38G(a)]

These are some additional points to keep in mind concerning the evaluation process:

Open meetings. If a board or committee has been set up to evaluate applications, it is subject to the state's open meeting law. [M.G.L. c. 39, §23B; M.G.L. c. 34, §9G]

Record-keeping. A permanent file must be maintained for each design procurement, containing copies of public notices; applications received; evaluations, rankings, and the reasons for the rankings; and other relevant information describing the selection process. In addition, if the evaluations and rankings are prepared by a committee, the file must contain the recorded votes of the committee. [M.G.L. c. 7, §38L]

Step 6: Finalize the contract.

If you have established a fixed fee, we recommend obtaining the following information from the top-ranked finalist:

- amount of time to be devoted to each phase of the project by key individuals, such as the designer's project manager;
- hourly rates the designer will use to calculate prices for additional work that is not included in the initial scope; and

- the markup, if any, that the designer will add to costs, including subconsultant fees, resulting from a change in the scope of work.⁹

When you review this information, you must decide whether you are satisfied with the level of effort devoted to the project by key individuals. If not, you can attempt to negotiate with the designer to increase the time commitment of one or more individuals to the project. Similarly, if you consider the rates for contract changes to be too high, you can attempt to negotiate lower rates.

If you are unable to reach a satisfactory agreement about the commitment of staff to the project or the rates for pricing contract changes, you can terminate the negotiations and begin negotiations with the second-ranked designer. On the other hand, if you are satisfied with the outcome of these negotiations and you have set a fixed fee, you can simply award the contract to the top-ranked finalist.

If you have set a not-to-exceed fee limit, you should ask the top-ranked designer to submit a fee proposal that includes a proposed lump-sum fixed fee along with the following information:

- percentage of time to be devoted to the project by key individuals, such as the project manager;
- hourly rates for the designer's personnel and the estimated number of hours each will devote to the project;
- hourly rates the designer proposes to charge for each subconsultant and the estimated number of hours that will be devoted by each subconsultant;
- an itemized breakdown of all other costs included in the fee proposal; and
- the markup, if any, that the designer will add to costs, including subconsultant fees, resulting from a change in the scope of work.¹⁰

⁹ It is generally unwise to allow the designer to charge on a cost plus a percentage of cost basis for extra work because this cost structure provides the designer with an incentive to incur more costs than necessary.

¹⁰ See the previous footnote.

You will want to determine whether the resources the designer promises to devote to the project (for example, key personnel staff hours and subconsultants) are sufficient and consistent with the fee proposal. You will also consider the reasonableness of the proposed fees. You may negotiate the fee proposal. As is the case with any negotiation, you will need to base your negotiating position on information about what is reasonable in the industry. You should not, through your negotiations, agree to lower the fee by lowering the qualifications of key personnel and subconsultants who will work on your project nor should you scale back the scope of services. To do so would undermine the basis of your selection of the top-ranked finalist.

If you cannot negotiate a reasonable fee with the top-ranked designer, you should terminate the negotiations and move on to the next-highest-ranked designer. However, if it becomes apparent in the course of negotiations with designers that the not-to-exceed fee limit is inadequate for the full scope of services, you should cancel the procurement rather than agreeing to a scaled-down scope. You should then reassess the project requirements and decide whether you should do additional in-house planning work or seek additional funding for a higher not-to-exceed fee limit for the study. Bear in mind that by skimping on costs in the planning and design stages of a project, you generally increase the risks of more costly problems later.

Step 7: Award and publicize the contract.

If you have set a not-to-exceed fee limit, you should determine whether the fee proposal submitted by the designer is within the not-to-exceed fee limit and is acceptable to you or can be negotiated to an acceptable level. If so, or if you have set the fee, you award the contract to the designer. Finally, the name of the designer awarded the contract must be published in the *Central Register*. A form for this purpose may be downloaded from the Secretary of the Commonwealth's website at www.mass.gov/sec.

Emergency Contracts

You may expedite designer selection whenever the health or safety of any persons will be endangered because of the time required for the selection under your normal designer selection procedures or when a deadline for action that is set by a court or

federal agency cannot be met if the designer selection procedures are followed. [M.G.L. c. 7, §38J] Your emergency procedures should be established in your written designer selection procedures. We recommend that your emergency procedures identify who has authority to determine that an emergency exists and provide for such competition as is reasonably possible under the emergency circumstances.

Design Contracts for Non-Building Public Works Projects

The designer selection law does not apply to contracts for the design of non-building public works. You have discretion to decide how to select designers for non-building public works projects. In contrast to the rules for selecting designers for building projects, you may solicit prices from designers and use price as a criterion in awarding a contract, and you need not perform an independent review to have a designer who performed a study perform subsequent design services.

Although you are not legally required to solicit competition for public works design contracts, there is no reasonable rationale for failing to do so for construction projects estimated to cost more than \$100,000. Similarly, it is often advisable to perform a review of a study prior to deciding whether the study designer should provide subsequent design services. A value engineering review of the study before beginning the design stage can also be beneficial for construction projects estimated to cost \$1 million or more. (Value engineering is discussed in the next chapter.)

The request for proposals (RFP) process outlined in M.G.L. c. 30B is a good model for competition for a public works design contract. This process calls for establishing evaluation criteria and soliciting separate price and non-price proposals. The non-price proposals are evaluated using the published criteria. After the proposals have been ranked, the prices are opened. You select the most advantageous proposal by weighing both qualifications and price. Whatever selection method you use, bear in mind that fostering competition among qualified individuals or firms is the best way to obtain high-quality services at a favorable price.

Although no state procurement law applies to design contracts for non-building public works projects, many of the issues discussed earlier in this chapter regarding the designer selection law are also relevant to these contracts. We encourage you to review the previous discussion, keeping in mind that you may alter some of the requirements to meet your needs. For example, you should:

- have written procedures in advance specifying how you will solicit and award these design contracts (Step 1);
- develop the RFP, including a project scope, evaluation criteria that may include fee proposals, and contract terms, many of which should resemble the terms of a building design contract (Step 2); and
- advertise the contract (Step 3).

You should then receive and evaluate proposals based on the evaluation criteria stated in the RFP, award a contract, and publicize the award. The designer with whom you contract must certify in writing that he or she has complied with state tax laws, reporting of employees and contractors, and withholding and remitting of child support. [M.G.L. c. 62C, §49A]

Design-Related Contracts Subject to M.G.L. c. 30B

Contracts for architectural, engineering, or other professional services that do not relate to a construction project are subject to the competitive requirements of M.G.L. c. 30B. For example, you must follow M.G.L. c. 30B in selecting an engineering firm to conduct traffic counts at every major intersection in your community if the traffic counts are not being conducted in connection with a road construction or repair project. A contract with an engineering firm to operate and maintain a public facility such as a wastewater treatment plant is also subject to M.G.L. c. 30B. For guidance in awarding contracts under M.G.L. c. 30B, consult our manual entitled *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property*.¹¹

¹¹ You may download this manual from our website at www.mass.gov/ig or order it from the State Book Store.

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III. The Planning Stage

As is the case with all procurements, care exercised in the early planning stage of a project is a sound investment in the project's success. This chapter begins with a brief summary of tasks relating to designer oversight and then discusses a major planning stage product: the study. This chapter also includes our recommendation for value engineering at the end of the planning stage for large construction projects, and concludes with a brief discussion of issues to consider when you are deciding whether to use employees or volunteers to perform design work.

Design Contract Oversight

Chapter I discussed the importance of hiring or designating a qualified project manager to administer and oversee the project on behalf of your jurisdiction from beginning to end. The project manager's major duties relating to the designer during the planning and design stages of the project might include the following:

- reviewing the designer's contract and any subsequent amendments;
- monitoring the designer's progress and working with the designer to resolve any problems hindering the project's completion;
- ensuring that users and others affected by the project are properly consulted;
- making decisions on design options presented by the designer, or, where decisions need to be made by others, seeing that the decisions are made and communicated to the designer; and
- reviewing and approving invoices for payment submitted by the designer.

The project manager also should be responsible for the many other tasks that are required to complete a project but that may not be within the scope of the designer's responsibilities. These might include overseeing acquisition of the site, working with your local attorney to draft the construction contract and related documents, analyzing insurance options for the construction stage, ensuring that project financing is available, and assisting the project's users in preparing for a smooth transition.

The Study

The design work for a construction project often begins with a feasibility study. You are not legally required to complete a study for every project. As a practical matter, however, you need to know enough about the project to write a scope of services for the design work. It is risky to proceed beyond the planning stage before firm decisions have been made on what the project will include, how much it will cost, and how it will be financed. If you have not figured out the approximate size of the new school building or determined the most cost-effective approach to improving the water treatment facility – in short, if you have not prepared a study – you are not ready to begin the design stage. A good source of more detailed information on the study process is a publication entitled *Guidelines for the Preparation of Studies for Building Projects* by the Division of Capital Asset Management (DCAM). This publication may be downloaded from DCAM's website at www.mass.gov/cam.

The study typically addresses a series of planning issues and questions, such as the following:

Program. A program, a document that describes the project requirements in terms of size, location, cost, and other major criteria, should answer questions such as the following: What are the specific functions and requirements that the proposed project must meet? How many people will use a facility? How many and what types of vehicles will use a road? What is the peak demand going to be? What functions will the facility be required to accommodate? How much space will those functions require? What are the performance requirements or standards for each component of the facility and for the facility as a whole? What special equipment or construction is needed? The program is one of the major products of a study.

Alternatives. What are the available alternatives for meeting the functional requirements of the project, and what are their relative costs and benefits? For example, the study might review alternate sites or analyze the relative costs and benefits of new construction versus renovation and expansion.

Surveys and field tests. The study may incorporate tests to obtain data on the cost and feasibility of various sites or design alternatives.

Environmental impacts. What are the expected environmental impacts of the project and how can negative impacts be mitigated? For some projects, an environmental impact study will be required under state or federal statutes.

Cost and financing. How much will the project cost to build? How much will it cost to operate and maintain? Where will the money come from?

These issues may be addressed in a single study or in a series of progressively more detailed studies. Of course, the precise study focus and content will depend on the project under consideration.

Studies may be prepared by local officials or volunteer citizen committees working with professional consultants. Nevertheless, many aspects of a study, such as the development of reliable construction cost estimates, require professional expertise. The cost of a proper study is very small in comparison to the total cost of a construction project and represents a worthwhile investment. In the long run, the problems created by inadequate planning can cost far more than the study.

The study should also involve the future users of the building or facility. The time to find out that the Fire Department plans to buy a new truck five feet longer than the current trucks is now, not after bidding the construction plans for a fire station that will be too short or for a nearby intersection that will have too small a turning radius for the new truck.

Value Engineering

Value engineering is a specialized design review technique aimed at analyzing the functions of a facility or project and matching those functions with the most cost-effective design possible. Value engineering is sometimes called value analysis, value management, or the value method. Scheduling a value engineering review early in the

project design can identify opportunities to improve the design and reduce life-cycle costs¹² without sacrificing significant time or investment of resources.

For projects with an estimated construction cost of \$1 million or more, we recommend that you schedule a value engineering review at the end of the planning stage of the project, after the program has been completed and a design approach has been selected. This stage of project development is sometimes referred to as the “concept design.” For projects with an estimated construction cost of \$10 million or more, we recommend that you schedule a second value engineering review near or at the end of the schematic design phase, when the design is approximately 10 to 30 percent complete.

Value engineering focuses on the total life-cycle cost of the facility or project over its useful life. Accordingly, a value engineering proposal may recommend reducing or increasing expenditures for construction to achieve significant future cost savings over the useful life of the asset. Evaluating the cost of implementing the value engineering proposal against the life-cycle cost savings offered by the proposal can be a useful process that promotes sound public spending decisions, flags wasteful design elements such as unnecessary features or overdesigned components, and improves design quality.

Value engineering is widely used by the federal government as well as many state and local awarding authorities for highway projects, buildings, wastewater treatment plants, and a host of other types of construction projects. The Federal Highway Administration (FHWA), which promotes value engineering for federally funded highway projects undertaken by the states, defines value engineering as:

The systematic application of recognized techniques by a multi-disciplined team to identify the function of a product or service, establish a worth for that function, generate alternatives through the use of creative thinking, and provide the needed functions to accomplish the original purpose of

¹² “Life-cycle cost” refers to the total cost over the useful life of the facility or project; thus, life-cycle costs include the initial capital costs for construction or purchase as well as all significant future costs, such as operation, maintenance, and energy costs.

the project, reliably, at the lowest life-cycle cost without sacrificing safety, necessary quality, and environmental attributes of the project.¹³

The Boston Society of Architects describes value engineering as a technique that can promote best value construction contracting:

In its purest form, *value engineering* [VE] refers to detailed, systematic procedures intended to seek out optimum value for both the initial and long-term investments of a construction project. The goal is to eliminate or modify features that add cost to a facility but do not add to its quality, useful life, utility or appearance. Using a non-adversarial, problem-solving approach, value engineers look at trade-offs between design concepts, construction techniques, materials, building types and up-front versus life-cycle costs to arrive at the best overall value.¹⁴

Depending upon the project size and complexity, the value engineering review may be conducted by a single value engineering specialist or by a value engineering team led by the value engineering specialist. For most municipal projects, a value engineering review generally should not take more than two or three days.

For building projects that are subject to the designer selection law, value engineering services must be procured using the designer selection procedures contained in M.G.L. c. 7 (discussed in the previous chapter). For non-building projects, we recommend that you solicit competitive quotations or proposals from qualified value engineering specialists. In either case, the value engineering specialist you select should be independent, with no business connection to the project designer or the other project participants. We recommend that you require, at a minimum, that at least one individual with whom you contract be a registered professional architect or engineer with at least five years of direct experience with the type of project you plan to build. You may want

¹³ 23 C.F.R. 627.3.

¹⁴ Boston Society of Architects, *What Every Owner Needs to Know About Value Engineering*, May 1996.

Value Engineering Process Example

The value engineering process often involves a variation of a multi-step job plan similar to this example adapted from the eight-step job plan developed by the Washington State Department of Transportation:

Eight-Step Job Plan

1. Selection Phase – Select the right projects, team, timing, processes, or elements.
2. Investigation Phase – Investigate the background information, technical input reports (such as traffic, soils, hydraulic, environmental, accidents) and field data, function analysis, team focus, and objectives.
3. Speculation Phase – Be creative and brainstorm alternative proposals and solutions
4. Evaluation Phase – Analyze alternatives, technical evaluation, life-cycle costs, documentation of logic, and rationale.
5. Development Phase – Develop technical and economic supporting data to prove the feasibility of the desirable concepts or ideas. Develop team recommendations. Recommend long-term as well as interim solutions as applicable.
6. Presentation Phase – Present the findings and recommendations of the VE team in an oral presentation at the conclusion of the study, and in a written report and workbook following the completion of the study. In many cases, the way the findings are presented can be as important as the findings themselves.
7. Implementation Phase – The recommendation formulated by the VE Team are given a fair and thorough evaluation by the appropriate managers of the Department. Prepare an implementation plan, including the response from the managers and a schedule for accomplishing the recommendations.
8. Audit Phase – Establish a record system to track the results and accomplishments of the VE program and to compile the appropriate statistical analysis as requested by management personnel.

to contract with a Certified Value Specialist (CVS). The CVS designation is granted by SAVE International¹⁵ to specialists who have met the Society's technical and experience requirements and whose principal career is value engineering.

¹⁵ SAVE International was formerly named the Society of American Value Engineers (SAVE).

Using Full-Time Employees and Volunteers for Design Services

You may use full-time employees or volunteers to perform design services. Before doing so, however, consider whether they have the appropriate qualifications for the work to be performed. Would you contract with them to do the work had they not been employees or volunteers? For a feasibility study, do they have the necessary technical expertise in the area to be studied? Do they have experience with projects similar in size, use, and complexity? And keep in mind that if you do not have a design contract in place, you may sacrifice important public protections such as errors and omissions insurance, a definite scope of services, and an enforceable agreement on the schedule.

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IV. The Design Stage

The role of the designer is to translate the functional requirements established in the program into a set of biddable construction documents. The design stage typically includes the following tasks and final products:

- Surveys and field tests to provide additional information about conditions at the site. The magnitude of this task will depend in part on the amount of field work done during the planning stage.
- Additional consultations with the project's users, abutters, and other affected individuals and groups.
- Preparation of sketches and schematic drawings, including site plans, floor plans, and façade drawings, which show the size and layout of the project.
- Analysis of major building components, including foundations; structures; electrical systems; and heating, ventilating, and air conditioning (HVAC) systems.
- Preparation of final plans, specifications, and other bid documents. The plans are the construction drawings. The specifications are the written materials that prescribe the amount and quality of materials to be furnished, the construction techniques to be used, and other construction-related information.
- Updated project cost estimates, based on the final plans and specifications.

The design stage on major projects is often divided into three phases: preliminary or schematic design, design development, and preparation of construction documents. During each phase, the designer is required to prepare and submit for approval specific deliverables. Major project decisions are made during the preliminary or schematic design phase. After the preliminary or schematic design has been developed and approved by the owner, the designer proceeds with the detailed design development. After the owner has approved the design development documents, the designer prepares the construction documents.

The construction documents include 100 percent complete plans and specifications that competing contractors will use to prepare their bids and that the selected contractor will follow in constructing the project. A well-developed and complete set of plans and

specifications should generate reliable bid prices and enable the construction process to proceed smoothly and efficiently. Conversely, flawed or incomplete plans and specifications can lead to a host of headaches ranging from excessive and expensive construction change orders to life-threatening construction defects.

For projects with an estimated cost of construction of \$10 million or more, we recommend that you conduct a value engineering review near or at the end of the preliminary or schematic design phase, when the design is approximately 10 to 30 percent complete. (The previous chapter of this manual provides a more detailed discussion of value engineering.) And for larger and more complex projects you may determine that it is worth the investment to schedule an additional value engineering review near or at the end of the design development phase, when the design is approximately 50 to 75 percent complete.

If you plan to hire or contract with a construction manager to oversee the construction stage of the project, we recommend that you bring this person on board before the plans and specifications are finalized and put out to bid. A “constructability review” of the construction documents by a knowledgeable construction manager may identify potential problems that can and should be corrected by the designer. Identifying such problems before bids are solicited and construction work begins will save you money and aggravation.

Proprietary Specifications

In general, the contract materials specifications prepared by the project designer must be written so that they can be met by more than one vendor or manufacturer. For every item specified, the specifications must either name a minimum of three brands or provide a description that can be met by at least three vendors or manufacturers, and for the equal of any of the named or described materials. [M.G.L. c. 30, §39M(b)]

Proprietary specifications – that is, specifications that restrict competition to one vendor or manufacturer of an item – may be used only for “sound reasons in the public interest.” [M.G.L. c. 30, §39M(b)] You must document these reasons and provide them

in writing to anyone making a written request for this information. If you use proprietary specifications for one or more items, the specifications for those items must include an “or equal” clause – that is, a provision allowing bidders to furnish items that are equal to the specified items. Under the law, an item is considered equal if:

- it is at least equal in quality, durability, appearance, strength, and design;
- it will perform the intended function at least equally; and
- it conforms substantially, even with deviations, to the detailed requirements contained in the specifications.

The awarding authority makes the determination as to whether a bid item is equal to the item named in a specification. [M.G.L. c. 30, §39M(b)]

Case Law Update: "Or Equal" Specifications

The Massachusetts Appeals Court recently decided a case dealing with "or equal" specifications under M.G.L. c. 30, §39M. The case, *E. Amanti & Sons, Inc. v. R.C. Griffin, Inc.*, 53 Mass. App. Ct. 245 (2002), involved specifications for an emergency vehicle exhaust system as part of an IFB by a town for construction of a new fire station. The town required that the emergency vehicle exhaust system be as specified by Plymo Vent or equal as approved by the fire department. Amanti, the HVAC sub-bidder, sought approval to use an emergency vehicle exhaust system manufactured by Carmon. The town's architect initially agreed, but later found that the alternative exhaust system did not meet the performance requirement in the specifications. Amanti requested that the architect name two additional exhaust systems which were equivalent to the Plymo Vent system. The architect responded with the names of two other manufacturers, but did not know whether their products met the specified safety features. Ultimately, Amanti, under protest, furnished the Plymo Vent system.

M.G.L. c. 30, §39M (b) requires that specifications be written "to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications may be otherwise written for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request therefor, in either instance such writing to be prepared after reasonable investigation." M.G.L. c. 30, §39M (b) further provides that "for each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers, and for the equal of any one of said named or described materials."

The lower court found that the town's specifications were proprietary. Although the town made a reasonable investigation, it did not make a written report in the public record or respond in writing to written requests about the specifications. The lower court found the town liable for Amanti's lost profits for having failed to disclose to bidders that Plymo Vent was a sole source.

On appeal, the town contended that its bid specifications complied with M.G.L. c. 30, §39M because the statute does not prohibit specifications from occupying a middle ground between specifications that allow for full competition and those that are proprietary. Amanti argued that the town did not comply with M.G.L. c. 30, §39M because it required a sole source for the vent system without notifying bidders that it was the only vent system that would meet the town's needs. The Appeals Court stated that "[p]roviding the name of a single vendor and placing the burden on the bidder to discover alternatives did not constitute competitive specifications." *E. Amanti & Sons, Inc. v. R.C. Griffin, Inc.*, 53 Mass. App. Ct. 245, 253. The Appeals Court agreed with the lower court and upheld the decision requiring that the town pay Amanti for lost profits.

Estimated Quantities

If it is impossible to pinpoint the exact quantities of the materials or other items to be included in the final plans and specifications, you can use estimated quantities for bidding purposes. For example, if you are bidding pothole repairs to town streets, the designer should estimate the number of cubic yards of bituminous concrete you will need and require bidders to submit both a unit price *and* a total price based on the estimate. (The contract will be awarded to the responsible and eligible bidder with the lowest total price, based on the estimated quantity or quantities. Then, when the work is performed, actual payments will be based on the actual quantity multiplied by the unit price in the bid.)

Building Projects > \$25,000: Additional Legal Requirements for Bid Documents

If the project will be bid under the provisions of M.G.L. c. 149, §§44A-M, which generally applies to any building construction project whose estimated cost exceeds \$25,000,¹⁶ the following legal requirements apply:

Contractor certification. The bid package must specify the category of work in which the general contractor must be certified.¹⁷ If your project will require the use of a certification category that is not on the standard list, you will need approval from the Division of Capital Asset Management (DCAM). This issue should be discussed with DCAM as early in the design process as possible.

Filed sub-bids. The filed sub-bid process, which is described in detail in the next chapter, applies to the following categories of work if performed under M.G.L. c. 149 contracts:

¹⁶ Chapter V contains more information on determining whether a project must be bid under M.G.L. c. 149.

¹⁷ Chapter V discusses the contractor certification process and lists the categories of work in which contractors may be certified.

Roofing and flashing	Metal windows
Waterproofing, damp-proofing, and caulking	Miscellaneous and ornamental iron
Lathing and plastering	Acoustical tile
Marble	Tile
Terrazzo	Resilient floors
Glass and glazing	Painting
Plumbing	Heating, ventilating, and
Electrical work ¹⁸	air conditioning (HVAC)
Elevators	Masonry work

If the estimated value of the subtrade work in any of these categories is greater than \$10,000, the work must be bid separately under the filed sub-bid procedures set forth in M.G.L. c. 149.¹⁹ To accommodate the filed sub-bid process, the designer must prepare separate plans and specifications for each filed sub-bid category. [M.G.L. c. 149, §44F(1)]

Note, however, that if a filed sub-bid category constitutes the predominant work on a project this work may be included as part of the main construction contract and need not be segregated into a separate contract for filed sub-bidding. [M.G.L. c. 149, §44F(3)] For example, for a project to repair the roofs of several town buildings, you could require the general contractor to be certified in the category of “roofing and flashing.”

To ensure that the sub-bidders on your project are qualified, you may establish your own qualification requirements that all sub-bidders must meet. For example, if the project calls for metal windows to be installed in a building, your bid documents could require that any sub-bidder for metal windows have successfully completed three jobs of similar size and scope to your project within the last five years. If a

¹⁸ This category includes direct electrical radiation for heating.

¹⁹ The awarding authority may combine marble, tile, and terrazzo into a single sub-bid category, provided that the sub-bidders are required to show on their bid forms the amounts for each category separately as well as the total.

sub-bidder does not have that experience, it is not an eligible sub-bidder on your contract.

Minimum scale. Plans prepared for M.G.L. c. 149 contracts must have a minimum scale of 1/8 in. = 1 ft. This requirement does not apply to site plans. [M.G.L. c. 149, §44B(1)]

Alternates. Alternates are options, for which the bidders must submit separate prices, that the awarding authority may include in a bid package. The awarding authority reserves the right to select or reject the optional work, based on the prices received. For M.G.L. c. 149 contracts, you may include alternates in the bid package only if they are ranked numerically in order of priority. (Later, when evaluating the bids, you may select a specific alternate only after all of the higher-ranking alternates have been selected.) [M.G.L. c. 149, §44G(B)]

Case Law Update: Ordered Alternates

The Massachusetts Appeals Court decided a case, *J.F. White Contracting Co. v. Massport Authority*, 51 Mass. App. Ct. 857 (2001), involving the use of alternates in an M.G.L. c. 30, §39M bid. The use of ordered alternates is explicitly permitted in M.G.L. c. 149 bids. Such alternate pricing is commonly used in M.G.L. c. 30, §39M bids, but the statute does not include any reference to its use.

Massport had solicited bids for a bridge renovation project. Massport asked bidders for alternate pricing: one price for the use of "type 5" cement concrete for the project and one price for the use of "silica fume" concrete. J.F. White Contracting Co. (White) was the lowest bidder for the type 5 concrete and M. DeMatteo Construction Co. (DeMatteo) was the lowest bidder for the silica fume concrete. Massport elected to award the contract to DeMatteo even though its overall price was higher, as it considered the silica fume concrete to be the superior product and the price differential was minimal. White filed suit challenging Massport's use of alternate pricing in the bid.

White's request for a preliminary injunction to prevent Massport from awarding the contract to DeMatteo was denied by the Superior Court, and the Appeals Court affirmed that decision. The Court stated that Massport was not prohibited from using alternate pricing in the manner that it did in this case. Massport's invitation for bids fully explained the alternatives under consideration, and bidders were placed on an equal footing to win the contract.

Energy system life-cycle cost estimates. Under M.G. L. c. 149, you are required to develop energy system life-cycle cost estimates for the following categories of projects:²⁰

- new buildings, where the estimated construction cost is greater than \$100,000;

²⁰ M.G.L. c. 149, §44M requires summaries of the life-cycle cost estimates to be filed with the Building Code Commission (now called the State Board of Building Regulations and Standards) and with the Director of the Office of Consumer Affairs and Business Regulation prior to the preparation of plans and specifications, in accordance with rules and regulations promulgated by the Director of the Office of Consumer Affairs and Business Regulation. As of January 2003, these rules and regulations had not been promulgated.

- additions to existing buildings, where the increase in gross floor space is at least 10 percent and the estimated construction cost is greater than \$100,000; and
- modification or replacement of an energy system in an existing building, where the estimated cost is greater than \$25,000. [M.G.L. c. 149, §44M]

Prohibition on allowances. Allowances are sometimes used in construction bidding to cover items for which the design has not been completed. This use of allowances is not permitted. If design work is not complete on a particular item, it must be deleted from the scope of work and procured under a separate contract at a later date. [M.G.L. c. 149, §44G(A)]

Evaluating the Designer's Performance

Most public agencies in Massachusetts, including state agencies, cities, towns, and other public jurisdictions, must complete and submit a designer evaluation form to DCAM and the DSB upon completion of a building project under their control. [M.G.L. c. 7, §38E] A copy of the completed evaluation form must also be mailed to the designer. At the schematic design phase, the public owner is required to provide the designer with a preliminary, informational, written evaluation of the designer's performance on the project. DCAM has developed designer evaluation forms pertaining to the design and construction phases of a project for use by public agencies. These forms can be downloaded from DCAM's website at www.mass.gov/cam.

M.G.L. c. 7, §38E provides qualified immunity to individuals responsible for completing designer evaluations on behalf of public owners. If a designer initiates a lawsuit in response to a completed evaluation, the awarding authority is required to provide legal representation and indemnification for the individual completing the evaluation on behalf of the awarding authority.

Any public agency that fails to complete the required designer evaluation and submit it to DCAM and the DSB within 70 days of completing a project will be ineligible to receive any state funds for public building or public works projects. [M.G.L. c. 7, §38E]

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V. Construction Bidding

The bid process described in this chapter is intended to ensure that contractors selected for public jobs are qualified and reliable; that competition for public contracts is fair and open; and that the public pays a fair price for its buildings and public works. This chapter summarizes the types of contracts that are subject to the Commonwealth's construction bid laws, the process of qualifying construction contractors for public building projects and public works projects, and the basic steps of construction bidding.

The Construction Bid Laws

For every public construction project, it is essential to determine which of the Commonwealth's two major construction bid laws will apply. If you have questions about whether a contract must be bid under M.G.L. c. 149 or M.G.L. c. 30, §39M, consult your local attorney or the Fair Labor and Business Practices Division of the Office of the Attorney General early in the design stage.

M.G.L. c. 149, §§44A-M governs all contracts for the construction, reconstruction, installation, demolition, maintenance, or repair of a building at an estimated cost of more than \$25,000. Although the statutes do not define "building," court decisions have indicated that the word is to be taken in its common and ordinary sense. If a structure has walls and a roof and encloses space that is to be used for some purpose, it is a building. Size is irrelevant, as is the fact that it may be part of a larger non-building project. If a building is included in the project, and if the total contract cost is greater than \$25,000, the contract must be bid under M.G.L. c. 149, unless it falls within the following exceptions:

- If a sewer or water supply project includes buildings whose sole function is to house pumps and related equipment, the project may be bid under M.G.L. c. 30, §39M. [M.G.L. c. 149, §44A(2)]
- Modular buildings may be procured using a request for proposals process outlined in M.G.L. c. 149, §44E(4).

- Energy-saving improvements to public buildings may be procured using a request for proposals process outlined in M.G.L. c. 25A, §11C.

M.G.L. c. 30, §39M governs all contracts for construction, reconstruction, alteration, remodeling, or repair estimated to cost more than \$10,000 that do not include work on a building. These contracts generally fall into the category of public works projects, or “horizontal construction” projects. Public works projects include not only the construction and repair of roads, bridges, water mains, sewers, and the like, but also work on improvement to public land such as public parks, outdoor swimming pools, and parking lots.

M.G.L. c. 30, §39M also governs contracts estimated to cost more than \$10,000 but not more than \$25,000 for construction, reconstruction, installation, demolition, maintenance, or repair work on a building.

Additionally, M.G.L. c. 30, §39M allows you to use the bid procedures contained in M.G.L. c. 30B, §5 for both building and public works construction work estimated to cost more than \$10,000, but not more than \$25,000. Unlike M.G.L. c. 30, §39M, M.G.L. c. 30B, §5 contains no bid deposit requirement or *Central Register* advertising requirement.

Finally, M.G.L. c. 30, §39M governs the purchase of construction materials estimated to cost more than \$10,000 for either public works or public building projects. For example, M.G.L. c. 30, §39M applies to a \$30,000 purchase of guard rail or a \$30,000 purchase of wall partitions (without labor).²¹

Awarding authorities may use the bid procedures contained in M.G.L. c. 30B, §5 in lieu of the M.G.L. c. 30, §39M bid procedures for purchases of construction materials if the purchase entails no labor.

Contracts of \$10,000 or less. Public construction contracts estimated to cost \$10,000 or less are not subject to the competitive provisions of either M.G.L. c. 149

²¹ Note, however, that if the purchase of wall partitions included installation services, the entire contract would be subject to M.G.L. c. 149 rather than M.G.L. c. 30, §39M.

or M.G.L. c. 30, §39M. We recommend that you solicit at least three informal quotations for such contracts and select the qualified contractor offering to perform the contract at the lowest price.

Maintenance and Repair Contracts

M.G.L. c. 149 and M.G.L. c. 30, §39M apply to contracts for maintenance or repair work as well as construction. For example, painting, plumbing repair, and asbestos removal contracts are subject to the requirements of these laws. While major repair contracts are bid based on detailed specifications prepared for a particular project, contracts for maintenance materials and services can generally be bid on an annual basis. It may make sense, for example, to award an annual interior painting contract for all public school buildings in a town, based on estimated quantities of the required labor and materials.

Noncompliance with the Construction Bid Laws

The law contains severe civil and criminal penalties for those public officials who thwart the process by failing to publicly advertise for contracts or by splitting contracts into smaller contracts for the purpose of evading the statutory requirements. [M.G.L. c. 149 §44J(7)] Contractors should also be aware that contracts awarded in violation of these requirements may be held unenforceable by a court, whether or not the contractor was acting in good faith.

If even part of the subject matter of a contract falls under the construction bid laws, a jurisdiction cannot avoid the bid requirements by calling the agreement something else or combining the construction with other services. For example, it would not be legal for a municipality to enter into an unadvertised contract with a developer to design, build, and operate a municipally owned sports arena on public land.

Navigating the Requirements

For the reader's convenience, we have provided symbols at the beginning of each section and subsection of the remainder of this chapter, indicating whether the text contained in the section or subsection relates exclusively to contracts subject to M.G.L. c. 149, exclusively to contracts subject to M.G.L. c. 30, §39M, or to both categories of contracts. The symbol **149** designates contracts subject to M.G.L. c. 149; the symbol **30** designates contracts subject to M.G.L. c. 30, §39M.

149 Qualifying Contractors for Building Projects > \$25,000

M.G.L. c. 149 requires that public construction contracts be awarded to the lowest *responsible and eligible* bidder. Under M.G.L. c. 149, "responsible" means:

Demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter. [M.G.L. c. 149, §44A(1)]

"Eligible" means:

able to meet all requirements for bidders or offerers set forth in sections forty-four A through forty-four H of this chapter and not debarred from bidding under section forty-four C of this chapter or any other applicable law, and who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work. [M.G.L. c. 149, §44A(1)]

There are two major components to the current system of qualifying contractors for public building projects in Massachusetts: contractor certification by the Division of Capital Asset Management (DCAM) and determination of bidder responsibility by public owners. Contractor certification is intended to exclude from bidding contractors whose past performance, financial condition, or qualifications render them unqualified for public building projects. Public owners are obligated to make a separate and final determination of bidder responsibility for a particular building project using the Update Statement.

149 Contractor Certification

M.G.L. c. 149 requires general contractors bidding on public building construction projects estimated to cost more than \$25,000 to be certified by DCAM. DCAM's Contractor Certification Office certifies contractors to bid on public projects in specific categories of work. The purpose of contractor certification is to identify those contractors that pose an unacceptable risk to awarding authorities and to disqualify such contractors from bidding on public building projects.

Each bidder on a M.G.L. c. 149 project must submit with its bid a Certificate of Eligibility issued by DCAM. [M.G.L. c. 149, §44D] To obtain a Certificate of Eligibility, a contractor must submit a qualifications statement to DCAM, which reviews the contractor's qualifications, past performance, financial condition, bonding capacity, and other relevant information. Because of the time required to obtain a certificate, a contractor generally must apply for certification well in advance of a project. Certificates must be renewed annually.

To evaluate contractors applying for certification, DCAM first conducts a review to determine whether the contractor meets certain minimum eligibility requirements and whether the application contains all of the required forms and information. Then DCAM evaluates the contractor's past performance using contractor evaluations and numerical ratings provided by public and private owners of projects²² completed by the contractor within the last five years. When necessary, DCAM supplements the written evaluations submitted by public owners with telephone evaluations from public owners who have not submitted the required evaluation forms and, in some cases, from private owners. A weighted average of the contractor's numerical ratings is then calculated. If the contractor's average numerical rating is 70 or higher, the contractor is certified.

Each certificate contains three important pieces of information: the category or categories of work for which the contractor is qualified; the Single Project Limit, which represents

²² Chapter VI contains a discussion of this contractor evaluation requirement.

the maximum bid that the bidder may submit on a single project;²³ and the Aggregate Work Limit, which represents the maximum annual value of all work the bidder may perform, including the annual value of the contract for which the bid is submitted.

DCAM issues certificates for the following categories of work:

General building construction	Telecommunication systems
Asbestos removal ²⁴	Alarm systems
Deleading	Painting
Demolition	Plumbing
Doors and windows	HVAC
Elevators	Electrical
Energy management systems	Masonry
Floor covering	Waterproofing
Mechanical systems	Fire protection sprinkler systems
Modular construction/Prefabrication ²⁵	Historical building restoration, historical masonry, and historical roofing
Pumping stations	Historical painting
Roofing	
Sewage and water treatment plants	

For each project, the awarding authority must designate the category or categories of work for which the general contractor must be certified and include this information in the published notices inviting bids.

149 Determining Bidder Responsibility

A valid Certificate of Eligibility indicates that a bidder on a M.G.L. c. 149 project has been certified by DCAM for a certain category of work, but the final determination of bidder responsibility is always in your hands. In addition to a Certificate of Eligibility,

²³ For certain contractors, DCAM assigns a separate project limit for general building construction. This separate “General Building Construction Limit” will appear on the contractor’s certificate above the contractor’s Single Project Limit.

²⁴ Asbestos removal contractors must also be licensed by the Department of Labor and Workforce Development. [M.G.L. c. 149, §6B]

²⁵ Modular buildings may be procured using a request for proposals process outlined in M.G.L. c. 149, §44E. Chapter VII of this manual provides detailed guidance on modular construction procurement procedures.

each M.G.L. c. 149 bidder must submit an Update Statement²⁶ showing recent and current projects, any significant changes in financial position, relevant litigation involving the bidder, and the names and qualifications of the supervisors proposed for the project. Any bid submitted without both the appropriate Certificate of Eligibility and the Update Statement is invalid, and you must reject it.

To determine whether a bidder is responsible, you should contact the project references listed on the bidder's Update Statement to verify that the bidder is qualified to perform the specific work called for in the contract you are awarding. Specific, factual questions are most likely to elicit accurate, objective information that can assist you in determining if the bidder has the necessary skill, ability, and integrity to faithfully perform the work. For example:

- Did the contractor perform the work in accordance with the plans and specifications?
- Did the contractor provide sufficient oversight of the work performed by subcontractors?
- Did the contractor adhere to the contract schedule? If not, were schedule delays attributable to the contractor?
- Did the contractor request change orders on the project? How many, and for what purpose? Of the change order requests, how many were determined to be justified by unforeseen conditions or other circumstances external to the contractor?

You may also use the questions listed in the contractor evaluation form (available at DCAM's website) to conduct reference checks based on the Update Statement. If, during the course of your reference checks, you obtain reliable information indicating that the apparent lowest bidder is not responsible, you have the right and the obligation to reject that bid and select the next lowest responsible and eligible bidder.

Although DCAM's contractor certification files are not public records, awarding authorities may review the contents of these files by appointment. [810 CMR 4.10] You

²⁶ The Update Statement is not a public record and must be removed from bid documents before these documents are offered for public inspection. [810 C.M.R. 4.09(3)] A blank Update Statement may be downloaded from DCAM's website at www.mass.gov/cam/forms.

should consider reviewing the entire certification file of the low bidder on any major project.

If you decide to disqualify a bidder on a M.G.L. c. 149 project, based on information in the Update Statement or for other reasonable cause, you must notify DCAM. [M.G.L. c. 149, §44D(6)]

③⑩ Qualifying Contractors for Public Works Projects and Small Building Projects

Like M.G.L. c. 149, M.G.L. c. 30, §39M requires that public construction contracts be awarded to the lowest responsible and eligible bidder. Under M.G.L. c. 30, §39M, “lowest responsible and eligible bidder” means:

The bidder (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work; (3) who, where the provisions of section eight B of chapter twenty-nine²⁷ apply, shall have been deemed qualified thereunder; and (4) who obtains within ten days of the notification of contract award the security by bond required under section twenty-nine of chapter one hundred and forty-nine; provided that for the purposes of this section the term “security by bond” shall mean the bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority. [M.G.L. c. 30, §39M(c)]

M.G.L. c. 30, §39M does not mandate a contractor prequalification process for public works projects or for public building projects estimated to cost \$25,000 or less. However, prequalification of bidders by the Massachusetts Highway Department (MassHighway) is required for contracts of \$50,000 or more where:

- the awarding authority receives State Aid funds under M.G.L. c. 90, §34; or
- the work is on a state road, regardless of whether the awarding authority receives State Aid funds under M.G.L. c. 90, §34.

²⁷ M.G.L. c. 29, §8B establishes a contractor prequalification process for contracts awarded by the Massachusetts Highway Department and the Metropolitan District Commission.

M.G.L. c. 90 provides financial assistance to municipalities for highway construction, preservation, or improvement projects that create or extend the life of capital facilities. Municipalities are required to notify the MassHighway Prequalification and Contract Office prior to advertising a M.G.L. c. 90 project valued at over \$50,000. Only contractors who submit a current Certificate of Approval from MassHighway are eligible to bid on these state-funded highway projects. The procedures you must follow for M.G.L. c. 90 projects are set forth in MassHighway's *State Aid Manual*. Appendix A includes contact information for MassHighway.

For all other M.G.L. c. 30, §39M projects, you as the public owner are required to determine that the apparent low bidder is responsible and eligible. Accordingly, we recommend that you include in your bid package a requirement that bidders submit a comprehensive list of ongoing projects, projects completed within the past five years, and project contact names and telephone numbers. You can then check a selected list of project references. The previous section of this chapter lists some sample questions that can be used to elicit information on the apparent low bidder's qualifications and past performance. It is a good idea to require bidders to certify under the penalties of perjury that the project information contained in the bids is accurate and complete.

149 30 Construction Bidding: The Basic Steps

This section describes the basic steps in the construction bidding process, which are listed below.

Step	Page
1. Prepare the bid documents.	64
2. Advertise the work.	65
3. Receive, open, and review sub-bids.	69
4. Distribute the filed sub-bidder list to all bidders.	71
5. Receive, open and review general bids.	71
6. Award the contract to the lowest responsible and eligible bidder.	74
7. Obtain bonds and execute the contract.	74
8. Return bid deposits and publicize the contract.	76

149 30 Step 1: Prepare the bid documents.

The bid documents consist of the package of materials, distributed to interested bidders, that form the basis for their bids. There are three major components of the bid document package:

Plans and specifications. These are the construction drawings and related written materials, prepared by the project designer, that explain in detail how the project is to be built.

Standard forms. On M.G.L. c. 149 projects, the package should contain several standard forms for the bidder to complete. These include a form for submitting general bids, a form for submitting sub-bids, and a blank Update Statement form. You must also request a prevailing wage sheet from the Division of Occupational Safety (DOS) within the Department of Labor and Workforce Development and include the sheet – or reference it – in the bid documents.²⁸ (Appendix B of this manual contains copies of the Form for General Bid and the Form for Sub-Bid. The Request for Prevailing Wage Rates form may be downloaded from the DOS website

²⁸ Since you are required to provide the prevailing wage sheet at no cost to anyone who requests it, it makes sense to include the sheet in the bid documents.

at www.mass.gov/dos.) There is no prescribed form for submitting M.G.L. c. 30, §39M bids; you may either use the M.G.L. c. 149 form or develop your own. All M.G.L. c. 30, §39M bids must contain language certifying that the bid has been made without collusion or fraud.

Terms and conditions. The bid package should also contain the various business and legal terms and conditions to which the contractor must agree. By necessity, the contract will be a lengthy and complex document, and a discussion of all the terms and conditions is beyond the scope of this manual. However, a brief section at the end of this chapter lists some particular provisions of which you should be aware.

We recommend that you develop a standard construction contract, which can then be used repeatedly with only minor modifications for each individual project. DCAM's standard contract for state projects can be used as a guide in developing a contract, although some changes are needed to reflect the slightly different legal requirements at the local level. As with any legal document, you should consult your local attorney when developing a standard construction contract.

Bid deposit. Each bidder must submit with its bid a bid deposit equal to five percent of the amount of the bid. The bid deposit may be in the form of a certified, treasurer's, or cashier's check payable to the awarding authority from a responsible bank or trust company; cash; or a bid bond from a licensed surety. [M.G.L. c. 149, §44B(2); M.G.L. c. 30, §39M]

149 **30** Step 2: Advertise the work.²⁹

At least two weeks prior to the deadline for submitting bids, a notice inviting bids must appear in the *Central Register*, published by the Secretary of the Commonwealth, and in a local newspaper. See the Secretary of the Commonwealth's website at www.mass.gov/sec for information on submitting notices to the *Central Register*. A

²⁹ The public notice requirements for projects subject to both M.G.L. c. 149 and M.G.L. c. 30, §39M are contained in M.G.L. c. 149, §44J.

notice must also be posted in the awarding authority's office at least one week prior to the deadline. For all projects, the notice must contain the following information:

- a description of the project in sufficient detail to allow bidders to determine if they are eligible and interested,
- where and when bid documents can be obtained,
- where and when bids are due,
- where and when the bids will be opened, and
- a reference to the payment of prevailing wages.³⁰

For M.G.L. c. 149 projects, the following additional items must be included:

- the contractor certification category of work for the general contractor,
- the filed sub-bid categories of work (where required),
- the place and time for submitting filed sub-bids (where required), and
- the place and time for opening filed sub-bids (where required).

The bid documents must be made available to all who request them. Keep a full record of the names and addresses of all who receive the documents. If it becomes necessary to issue an addendum³¹ to the bid package, send the addendum to all who have obtained the original bid documents. To avoid misunderstandings or protests, you should require bidders to acknowledge in their bid forms that they have received all addenda to the original bid documents. For M.G.L. c. 149 projects, the statutory bid form contains a space for this acknowledgment.

³⁰ The reference to prevailing wages must be included either in the notice or in the invitation for bids. [M.G.L. c. 149, §27]

³¹ Before bid openings, any changes or corrections to the plans, specifications, or contract terms and conditions must be distributed in an addendum.

There are two additional requirements for M.G.L. c. 149 projects. First, each bidder is entitled to one free set of bid documents.³² Second, the list of contractors who have requested the bid documents must be updated daily and posted in the awarding authority's office and sent weekly to the *Central Register*. [M.G.L. c. 149, §44B]

For larger or more complex projects, it may make sense to schedule an optional or mandatory prebid conference, which may include a tour of the site or facility. If you do so, you must notify all bidders requesting bid documents of the date, time, and location of the prebid conference. Be sure to record the names of firms in attendance, the questions asked by attendees, and the answers provided by your representatives at the conference. This information should then be distributed to all firms receiving the bid documents.

³² You may require a deposit, which must be refunded when the bid documents are returned.

149 The Filed Sub-Bid System for Building Projects >\$25,000

General contractors on major construction projects typically hire subcontractors to perform certain specialized aspects of the work. For many years Massachusetts has used the “filed sub-bid” system for selecting certain subcontractors on public building construction projects subject to M.G.L. c. 149. A subcontractor must be selected through the filed sub-bid system if the following three conditions are met:

1. the project is being bid under M.G.L. c. 149,
2. the subcontractor’s work falls under a filed sub-bid category of work listed earlier in this chapter, and
3. the estimated cost of the subcontract is greater than \$10,000.

Subcontractors must submit sub-bids for the work in each filed sub-bid category directly to the awarding authority, using the standard Form for Sub-Bid contained in Appendix B of this manual. Subcontractors may submit unrestricted sub-bids, meaning that their sub-bids are available for use by any general contractor, or they may restrict their sub-bids so that only certain general contractors can use them.

In addition, you may have identified certain classes of work which, in your opinion based upon an investigation of the work involved, are estimated to cost in excess of \$10,000 and are customarily performed by sub-subcontractors. If your specifications have included this work, sub-bidders must also list all sub-subs they plan to use and their bid prices. This sub-sub-bid work is often referred to as “Paragraph E work,” since such work is listed under Paragraph E on the standard bid form.

After screening the sub-bidders, the public owner provides a list of eligible sub-bidders and their sub-bid prices to all interested contractors. Each general contractor must select, in each sub-bid category, the subcontractor it wishes to use (provided it is not restricted by the subcontractor). The general contractor must list in its general bid the names of the selected subcontractors and the respective sub-bid amounts. General contractors are *not* required to take the lowest sub-bid in each category.

A general contractor may also submit a filed sub-bid if the general contractor normally does the work covered by the sub-bid category with its own employees and the contractor is qualified to perform the work. The rule is that if a general contractor submits a filed sub-bid, it must list itself for that subtrade on its general bid. The exception to this rule is that the general contractor may list the lowest responsible and eligible sub-bidder on its general bid if:

1. the other sub-bid is lower than the general’s sub-bid,
2. the other sub-bid is available for the general’s use, and
3. the other sub-bid is not restricted to the general’s use alone or the general’s use and that of another general bidder or other general bidders. [M.G.L. c. 149, §44F(5)]

149 Step 3: Receive, open, and review sub-bids.

The deadline for receipt of filed sub-bids is at least four and one half working days prior to the day on which general bids are opened.³³ [M.G.L. c. 149, §44F(3)] Filed sub-bids are subject to the same requirement for bid deposits as are general bids (see Step 1, above). The sub-bids are publicly opened and read. The awarding authority must reject any sub-bids that do not have a bid deposit or that do not otherwise conform to the bidding requirements.³⁴

You may, at your discretion, reject a sub-bid when:

- you determine that a sub-bidder is not competent to perform the work;
- you receive fewer than three unrestricted and available sub-bids in a sub-trade category and the prices are not reasonable for acceptance without further competition;³⁵ or
- the sub-bid includes only a minor or trivial deviation from a statutory requirement, or the sub-bid deviates from your own requirement, rather than from a statutory requirement.

When considering sub-bidder competence, you should consult with your project designer. Your determination of a sub-bidder's competence will not be overturned unless it can be found that your determination was made in an illegal or arbitrary manner.³⁶

³³ M.G.L. c. 149 provides that sub-bids must be filed before noon at least four working days before the general bid opening.

³⁴ A sub-bid must be rejected if it contains no bid deposit; if it does not conform with any other statutory bidding requirement in matters of substance; or if it is on a form that is incomplete, conditional, obscure, or contains additions not called for.

³⁵ See *Annese Electrical Services, Inc. v. City of Newton*, 431 Mass. 763 (2000). The Office of the Attorney General has also determined that the three sub-bid requirement must be limited to those sub-bids open to all general bidders and available for use by the awarding authority (that is, those sub-bids not rejected or withdrawn).

³⁶ As discussed in the previous chapter, you may establish qualifications for sub-bidders in the bid documents.

149**Filed Sub-Bids: Special Circumstances****If you receive no sub-bids, or only restricted sub-bids, in a particular category . . .**

You may issue a directive to the general bidders to include that subcontract work within the general's scope of work. The winning general contractor can then select a subcontractor, subject to the approval of the awarding authority. If you determine that the proposed subcontractor is unqualified, the general contractor is obligated to substitute a different subcontractor (again, subject to your approval), but the price of the contract is *not* adjusted because of the substitution. [M.G.L. Chapter 149, §44F(4)(a)(1)]

If you receive only one or two unrestricted and available sub-bids in a particular category . . .

If you find that the sub-bids are reasonable, you may proceed in the normal manner. But if the sub-bids are unreasonably high, you may reject them and use the following alternate procedure [M.G.L. c. 149, §44F(4)(a)(2)]:

- Specify in an addendum issued with the list of sub-bidders an amount for each of the general bidders to carry in their bids for that category of work.
- Issue requests for sub-bids, in writing, to at least three qualified firms, and publicly open their bids at the time and place specified in the written request for sub-bids.
- Select the lowest sub-bidder to whom the winning general contractor has no objection, and adjust the general contract price to reflect the difference between the amount stated in the addendum and the actual subcontract cost.

Note that the Office of the Attorney General has taken the position that restricted sub-bids should not be counted for purposes of determining if three sub-bids were received. See, for example, *In Re: Boston Public Facilities Dept. Back Bay Maintenance Facility*, May 21, 1997.

If a sub-bidder wants to withdraw its sub-bid before the sub-bid opening . . .

M.G.L. c. 149 does not directly address when sub-bidders may withdraw bids. As a practical matter, if a sub-bidder wants to withdraw its sub-bid before the sub-bid opening, you should let it do so. It is probably best to get a written request and return the sub-bid and bid deposit unopened.

149 Step 4: Distribute the filed sub-bidder list to all bidders.

Mail the list of the sub-bidders, and their sub-bid amounts, to all those who have received the bid documents. This list must be sent out at least two working days before the general bids are opened. [M.G.L. c. 149, §44F(3)]

149 (30) Step 5: Receive, open, and review general bids.

All bids must be publicly opened and read at the time at which they are due. [M.G.L. c. 149, §44J(4)] The following items should be checked for each bid:

- Is the bid for the right project?
 - Is the bid amount specified?
 - Is the bid signed?
 - Is a bid deposit included?
- Neither M.G.L. c. 149 nor M.G.L. c. 39, §39M specifies when a general bidder may withdraw its bid. As a practical matter, if general bids have not been opened, you should obtain a written request and return the bid and bid deposit unopened.
- Has the bidder acknowledged receipt of any and all addenda issued by the awarding authority?
 - For M.G.L. c. 149 contracts, has the bidder submitted a Certificate of Eligibility and an Update Statement?

All bid documents, with the exception of the Update Statements, are open for public inspection.

The law requires that the contract be awarded to the lowest *responsible* and *eligible* bidder. [M.G.L. c. 149, §44A; M.G.L. c. 30, §39M] In general, “eligible” means the bidder meets all the requirements set forth in the bid documents; “responsible” means that the bidder possesses the skill, ability, and integrity to complete the job. Page 58 of this manual contains the full statutory definitions of these terms.

On M.G.L. c. 149 projects, you review the apparent low bid to verify that the bidder has submitted a current Certificate of Eligibility for the appropriate category of work and an

Update Statement.³⁷ You also verify that the amount of the bid does not exceed the appropriate project limit (General Building Construction Limit or Single Project Limit) listed on the Certificate of Eligibility and that the bidder will not exceed the Aggregate Work Limit listed on the Certificate of Eligibility if the bidder is awarded the contract.³⁸

When determining whether the apparent low bidder on a M.G.L. c. 149 project is responsible and eligible, you are required to consider information provided in the Update Statement (as discussed earlier in this chapter). If you determine that the low bidder is not responsible and eligible, you are required to reject the bidder and evaluate the next low bidder. You are also required to notify DCAM of this action. [M.G.L. c. 149, §44D]

Using an unqualified contractor can be far more costly and time-consuming in the long run than defending your jurisdiction's decision not to use an unqualified contractor. Bid protests can delay the project, but do not let this discourage you from disqualifying a bidder when necessary. Make sure you have solid, documented reasons for your decision to disqualify the bidder.

On M.G.L. c. 30, §39M projects, you review the qualifications of the apparent low bidder after the bids are opened.³⁹ You may request any information from the bidder needed to determine if the bidder is responsible. Requiring bidders to provide references that can verify their past performance on recent or comparable contracts is an effective way to assess bidder responsibility. To avoid the possibility that a bidder might provide a selective list that excludes potentially unfavorable references, consider requiring the bidder to provide a list of all contracts within a specified time period. Then you can decide which of the references to contact.

³⁷ See *Richard W. Reid, Inc. v. Massachusetts Water Resources Authority*, 55 Mass.App.Ct. 1116 (2002)

³⁸ The Update Statement includes detailed instructions to awarding authorities on how to determine whether the low bidder is within its Aggregate Work Limit.

³⁹ Municipal highway projects funded in part through M.G.L. c. 90, §34 are subject to MassHighway's contractor prequalification requirements. Contact MassHighway for further information.

The following are some additional issues to consider in reviewing construction bids:

Analysis of bid price. If the low bid is significantly higher than the designer's construction cost estimate, it is often useful to understand why before awarding the contract. Ask the designer to analyze the bids. You can then decide whether to proceed with the award; wait and rebid the project at another time, if the differences resulted from temporary market conditions; or return to the design stage to reduce the project scope.

Debarments. A debarred contractor is not eligible for the award of public contracts during the period of its debarment. Debarments may be made for violations of the public contracting statutes or other laws, or for repeatedly deficient performance. The *Central Register* publishes the names of contractors debarred by DCAM or the Office of the Attorney General.

Rejection of bids. An awarding authority has the power to reject any and all general bids if it is in the public interest to do so. For example, if all bids are significantly higher than the designer's construction cost estimate, you may choose to reject all bids and rebid the project after scaling back the design.

Substitution of sub-bidders. On M.G.L. c. 149 projects entailing filed sub-bid work, the awarding authority may require the winning general contractor to use a different sub-bidder than one listed on the general contractor's bid form, unless the general contractor objects to the change and has a reasonable basis for its objection. The substituted sub-bidder must appear on the list of eligible sub-bidders distributed by the awarding authority. If a switch in sub-bidders is made, the total contract price is adjusted to reflect the difference in the sub-bid prices. In most cases, you will want to substitute a sub-bidder with a lower price than the one listed on the general contractor's bid. For the unusual case where an awarding authority wants to substitute a sub-bidder with a higher price than the one named on the general contractor's bid, the statutorily mandated procedure could result in the award of the general contract to a different general bidder. [M.G.L. c. 149, §44F(4)(b)]

149 30 Step 6: Award the contract to the lowest responsible and eligible bidder.

For M.G.L. c. 149 projects, you must award the contract within 30 working days after the general bid opening.⁴⁰ [M.G.L. c. 149, §44A(3)] However, if the general bidder you first select fails to execute the contract or obtain the proper bonding, the 30-day rule does not apply, provided that the second lowest general bidder consents to accepting the contract after 30 days.

Unlike M.G.L. c. 149, M.G.L. c. 30, §39M sets no specific time limits for the execution of the contract.

149 30 Step 7: Obtain bonds and execute the contract.

After the lowest responsible and eligible bidder is notified of the contract award, this bidder must provide you with evidence of a performance bond (for M.G.L. c. 149 projects) and a payment bond (for both M.G.L. c. 149 and M.G.L. c. 30, §39M projects):

Performance bond. A performance bond is a bond obtained by the contractor, from a surety, that is payable to the awarding authority in the event that the contractor fails to perform the contract. The performance bond for a M.G.L. c. 149 contract must be in the amount of the full contract price. M.G.L. c. 30, §39M contracts do not require performance bonds; however, you may require one if you so choose.

Payment bond. A payment bond is a bond obtained by the contractor, from a surety, that guarantees payment to materials suppliers and/or subcontractors in the event that the general contractor fails to pay the materials suppliers and/or subcontractors. The payment bond for a M.G.L. c. 149 contract must be in the amount of the full contract price. The payment bond for a M.G.L. c. 30, §39M contract must be in the amount of at least 50 percent of the contract price. [M.G.L. c. 149, §§29, 44E]

⁴⁰ If the contract award must be approved by an officer, board, or agency of the federal government, you must make the award within 30 working days of receiving that approval. [M.G.L. c. 149, §44A(3)]

For M.G.L. c. 149 projects, the general contractor has five working days after receiving the contract from you to obtain the payment and performance bonds and execute the contract. [M.G.L. c. 149, §44E(2)]

For M.G.L. c. 30, §39M projects, the contractor has 10 days from the date of notification of contract award to obtain the payment bond. [M.G.L. c. 30, §39M(c)]

Note that performance and payment bonds must be issued by a surety qualified to do business under the laws of the Commonwealth of Massachusetts and satisfactory to the awarding authority. We recommend that you accept performance and payment bonds only from sureties licensed by the Massachusetts Division of Insurance. Check with the Division of Insurance if you have any concerns about the legitimacy or reliability of a particular surety.

If the selected bidder on the general contract fails to execute a contract or furnish the necessary bonds, you should select the next lowest responsible and eligible bidder. [M.G.L. c. 149, §44A(3)]

For M.G.L. c. 149 projects, the selected general bidder must present a subcontract to each selected filed sub-bidder. These subcontracts must be executed within five working days of presentation. The subcontract form is specified at M.G.L. c. 149, §44F(4)(c). The general contractor may request subcontractors to furnish performance and payment bonds. [M.G.L. c. 149, §44F(3)] If a subcontractor fails to execute the subcontract or to furnish the necessary bonds, the general bidder and the awarding authority must select from the other non-rejected filed sub-bidders the lowest responsible and eligible sub-bidder to which the general bidder has no objection.⁴¹ The contract price is adjusted by the difference between the amount of the sub-bid and the amount of the original sub-bidder's sub-bid. [M.G.L. c. 149, §44F(4)(c)] Your local

⁴¹ In certain circumstances, an awarding authority may also retain the ability to reject all sub-bids under M.G.L. c. 149, §44E(1). See *Annese Electrical Services, Inc. v. City of Newton*, 431 Mass. 763 (2000).

attorney can advise you regarding the specific contracting requirements applicable to your jurisdiction.

149 30 Step 8: Return bid deposits and publicize the contract.

For M.G.L. c. 149 projects, bid deposits of general contractors must be returned within five working days after the bid opening, except that the deposits of the three lowest responsible and eligible bidders must be retained until a contract is executed or, if no award is made, until the expiration of the time for making an award. [M.G.L. c. 149, §44B(3)] If a low bidder fails to sign a contract or provide the necessary bonds, you are required to keep that bidder's deposit as damages, unless the contractor's failure was due to death, disability, a bona fide clerical or mechanical error of a substantial nature, or other similar unforeseen circumstance. [M.G.L. c. 149, §44B(3)] Note, however, that the amount you retain may not exceed the difference between the original bidder's price and the bid price of the next lowest responsible and eligible bidder. [M.G. L. c. 149, §44B(3)]

For M.G.L. c. 149 projects, you should keep the following sub-bid deposits until the execution and delivery of the general contract:

- all sub-bidders named on the bids of the three lowest responsible and eligible general bidders, and
- the bid deposits of the three lowest responsible and eligible sub-bidders in each sub-bid category.

The remaining bid deposits from sub-bidders must be returned within five working days of the general bid opening.

Unlike M.G.L. c. 149, M.G.L. c. 30, §39M sets no specific time limits for the execution of the contract or the return of bid deposits, so you may follow the M.G.L. c. 149 requirements for these projects.

Finally, the name of the firm or firms awarded the contract must be published in the *Central Register*. A form for this purpose may be downloaded from the Secretary of the Commonwealth's website at www.mass.gov/sec. [M.G.L. c. 9, §20A]

149 30**Exceptions**

This section discusses several circumstances in which the normal bid process might not be followed.

149 30 Emergencies

For M.G.L. c. 149 projects, you may dispense with the normal bidding procedures for work needed to preserve the health or safety of people or property. The prior approval of DCAM is required unless the urgency of the situation makes it impossible to contact DCAM in advance. In such a case, you may start the emergency work, but you must contact DCAM as soon as possible to request approval.⁴² [M.G.L. c. 149, §44A(4)] If DCAM determines that an emergency waiver is warranted, DCAM may waive public notice and public bidding requirements for the work. The waiver must be obtained in writing. [M.G.L. c. 149, §44J(6)]

For M.G.L. c. 30, §39M projects, you may dispense with the normal bid process only in cases of “extreme emergency caused by enemy attack, sabotage, other such hostile actions or resulting from explosion, fire, flood, earthquake, hurricane, tornado or other such catastrophe.” Only work necessary for “temporary repair and restoration to service of any and all public work in order to preserve health and safety of persons and property” may be performed under an emergency contract. [M.G.L. c. 30, §39M(a)] You must obtain a written waiver of the public notice requirements from DCAM. [M.G.L. c. 149, §44J(6)]

In both cases, although formal bidding may not be required, you should solicit as many informal quotations or bids as is possible under the circumstances. Note also that other M.G.L. c. 149 requirements, including prevailing wage requirements, will still apply to the contract.

⁴² If DCAM subsequently disapproves the emergency request, work must be stopped immediately, although the contractor is still entitled to payment for work done prior to the stop work order.

You may not artificially create an emergency simply by putting off normal maintenance and repair work. If you knew or should have known that a roof needed repair, and you had time to fix it using the normal bidding procedures, you may have difficulty justifying the use of emergency procedures when it starts leaking.⁴³

③0 Bidding Smaller Construction Contracts Under M.G.L. c. 30B, §5

Contracts for construction work on public buildings or public works, or for construction materials, estimated to cost more than \$10,000 but not more than \$25,000 may be awarded by following either M.G.L. c. 30, §39M procedures or the bid procedures contained M.G.L. c. 30B, §5. [M.G.L. c. 30, §39M(d)(4)] The M.G.L. c. 30B, §5 bid procedures differ slightly from the M.G.L. c. 30, §39M bid procedures outlined in the previous pages. For example, M.G.L. c. 30, §39M requires you to advertise the contract in the *Central Register*, whereas M.G.L. c. 30B, §5 does not. In addition, M.G.L. c. 30, §39M requires you to obtain a bid deposit from the bidder totaling five percent of the bid amount; M.G.L. c. 30B, §5 does not. For more information on M.G.L. c. 30B, §5 bid procedures, we recommend that you consult Chapter 4 of the manual issued by the Office of the Inspector General entitled *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property*.⁴⁴

Whether you choose to procure the construction work under M.G.L. c. 30, §39M or M.G.L. c. 30B, §5, the process must comply with the legal requirements that apply to contracts for construction-related work, such as applicable prevailing wage and payment bond requirements.

The key requirements for each method of procuring construction services or materials totaling between \$10,000 and \$25,000 are presented on the following page.

⁴³ See *Safford v. Lowell*, 225 Mass. 220 (1926).

⁴⁴ You may download this manual from our website at www.mass.gov/ig or order it from the State Book Store.

**Construction Services or Materials Contracts
Totaling \$10,000 to \$25,000
Comparison of Procurement Methods**

Requirement	M.G.L. c. 30B, §5	M.G.L. c. 30, §39M
Competitive process	✓ bids	✓ bids
Office posting	✓	✓
Newspaper	✓ at least two weeks	✓ at least two weeks
<i>Central Register</i>	no	✓ at least two weeks
Bid deposit	no	✓ 5% of bid amount
Performance bond	no	no
Payment bond for construction contracts	✓ 50% of contract award	✓ 50% of contract award
Contractor prequalification	no	no
Prevailing wages	✓	✓

149 30 In-House and Volunteer Construction

You may use qualified employees for construction work without putting it out to bid, provided the work falls within the scope of the employees' normal duties and expertise. The bidding requirements of M.G.L. c. 30, §39M apply to the purchase of materials used in construction work for both building and non-building projects.

The use of volunteer labor is often proposed as a cost-saving measure, particularly in smaller towns. Although the law does not prohibit this practice, we discourage using volunteers for larger projects or those involving structural, mechanical, or electrical work. Deficient work could have costly consequences for these types of projects. If volunteers are used, qualified supervision is essential.

Keep in mind, too, that the bid laws apply even if you spend as little as \$10,000 on the project. Thus, a town cannot "give" the local civic association \$10,000 to buy materials and fix up the town bandstand; any agreement to spend public funds on public construction must be consistent with the bid laws.

149

30

The Construction Contract

In developing a construction contract, you should be aware of statutory requirements and sound business practices. The following is a list of required and recommended contract provisions:

Employment. The contract must contain various provisions relating to wages and employment conditions, including but not limited to, the payment of prevailing wage rates as set by the Department of Labor and Workforce Development (DLWD); hiring preferences for veterans and residents of Massachusetts; and workers' compensation coverage. [M.G.L. c. 149, §§26-37] Note that you must obtain the prevailing wage rates applicable to the project from DLWD in advance of the bidding process.

Change orders and adjustments. The contract must contain provisions requiring the awarding authority to adjust the price if field conditions differ substantially or materially from the plans or if the awarding authority suspends or delays the work for 15 days or more. [M.G.L. c. 30, §§39N-39O] The contract should also include terms governing the adoption and pricing of change orders. Finally, the contract should clearly specify who is authorized to approve change orders on behalf of the awarding authority, and should state that the awarding authority is not obligated to pay for change orders that are not approved in writing. (See M.G.L. c. 44, §31C and c. 30 §39I.)

Performance and payment bonds. The contract should include the requirements for performance and/or payment bonds.

Foreign corporations. Contractors and subcontractors that are incorporated outside of Massachusetts must certify compliance with certain corporation laws. You are required to notify the Secretary of the Commonwealth and the Department of Revenue whenever awarding a contract or subcontract to an out-of-state corporation. [M.G.L. c. 30, §39L]

Payment procedures. The contract must contain statutory language governing payment procedures. [M.G.L. c. 30, §§39F, 39G, 39K]

Weather protection. M.G.L. c. 149 contracts must require the contractor to provide weather protection during winter months, in accordance with standard specifications issued by DCAM. [M.G.L. c. 149, §44G(D)]

Financial reporting. Contractors must agree to keep certain financial records, make them available for inspection by certain state agencies, and file periodic financial reports. [M.G.L. c. 30, §39R]

Auditor's certification. For cities and towns, the contract must contain a certification by the municipal auditor or accountant stating that appropriated funds are available for the contract and that the official signing the contract has been authorized to do so. The certification should also identify any other municipal officials who have been authorized to make decisions under the contract, such as approval of change orders and invoices. [M.G.L. c. 44, §31C]

Interpretations and approvals. The contract must contain provisions requiring prompt decisions by the awarding authority on interpretations of the specifications and other approvals. [M.G.L. c. 30, §39P]

Liability insurance. You may either require the general contractor to provide project insurance covering both the contractor and your jurisdiction or you may arrange to insure your jurisdiction separately.

Tax compliance. Any person contracting with the Commonwealth of Massachusetts or any subdivision of the Commonwealth, including a city, town, or district, must certify in writing that he or she has complied with all state laws relating to taxes, reporting of employees and contractors, and child support. [M.G.L. c. 62C, §49A]

Liquidated damages. You may want to include a provision for imposing liquidated damages on the contractor for late completion. Liquidated damages represent the dollar damages your jurisdiction will incur in the event of a breach of contract.

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VI. The Construction Stage

Once the contract is awarded, the general contractor will mobilize its work force and begin construction. The general contractor's job is to complete the project in accordance with the plans and specifications prepared by the designer.

149 30

Payment Procedures

You must comply with specific payment procedures on all public building projects, whether they are bid under M.G.L. c. 149 or M.G.L. c. 30, §39M.⁴⁵ Although the procedures covering building and non-building projects are similar, they differ in several important respects. Rules and procedures for making final payments to contractors on building and non-building projects are discussed later in this chapter.

For building projects costing more than \$2,000, the contract must contain specific provisions, found in M.G.L. c. 30, §39K, regarding periodic estimates and payments to contractors. These provisions also detail the amounts the awarding authority must withhold⁴⁶ and how arithmetic errors in contractor invoices must be handled.

The payment procedures for non-building projects bid under M.G.L. c. 30, §39M are somewhat different. These procedures are found in M.G.L. c. 30, §39G.

149 30

Payroll Records

During the construction project, it is the awarding authority's responsibility to monitor contractors' compliance with the prevailing wage law. Weekly payroll records must be collected from all contractors and kept on file for all projects subject to the law. The Division of Occupational Safety will usually send you a preprinted weekly payroll report

⁴⁵ Local housing authorities are subject to different payment procedures, and should contact the Department of Housing and Community Development for further information on these procedures.

⁴⁶ The owner is entitled to withhold from its periodic payments five percent of their dollar value (referred to as "retainage"), the value of all claims by the owner against the contractor, and the total of all outstanding claims for direct payment.

form when you request a prevailing wage rate sheet. These weekly payroll records must be maintained by the awarding authority for three years following completion of the construction project.

149 30**Substitutions**

The general contractor will often submit requests to substitute particular items as being “equal” to those required in the specifications. Your obligation is to assure that the proffered item does, in fact, meet the specifications. Your construction manager (or designer providing construction management services) should review substitution requests and approve or make recommendations to you regarding such requests.

Whenever you are required to interpret specifications or approve substitutions of equipment, materials, or construction methods for those specified in the contract, you must make a decision within 30 days of the contractor’s written submission. If extended investigation or study is required, then you must give the contractor written notice within 30 days of the reason that the decision cannot be made and the date by which the decision will be made. [M.G.L. c. 30, §39P]

149 30**Change Orders**

The contractor is obligated to perform all of the construction work in conformity with the contract plans and specifications. However, changes to the construction plans and specifications may be necessitated or warranted for a variety of reasons, including:

- site conditions that differ from those shown in the construction plans;
- circumstances requiring the awarding authority to suspend, delay, or interrupt all or part of the work; or
- requests by the awarding authority or the contractor for changes to the plans and specifications.

A change order is an amendment to the construction contract that alters one or more items specified in the original contract documents, such as construction materials, methods, or equipment; the services provided by the contractor, subcontractors, or

suppliers; and/or the contract schedule. A change order may have no effect on the contract cost, may increase the contract cost, or may decrease the contract cost through a credit from the contractor. Similarly, a change order may have no effect on the contract schedule, may extend the schedule, or may accelerate the schedule. The following discussion of change orders applies to both M.G.L. c. 149 contracts and M.G.L. c. 30, §39M contracts.

Change orders must be in writing. Within 30 days after a change order is issued, the awarding authority must issue a certificate, signed under penalties of perjury, containing the following information:

- an explanation of why the change is needed;⁴⁷
- a statement that any substitute work is of the same cost and quality, or that the contract price has been equitably adjusted; and
- a statement that the change will not significantly hurt the project and that it is in the best interest of the awarding authority. [M.G.L. c. 30, §39I]

149 30 Change Order Approval Procedures

The construction contract should include detailed change order management and approval procedures. The procedures should spell out the responsibilities of the parties, specify who is authorized to approve change orders on behalf of the awarding authority, and establish a claims resolution process that avoids project delays. The procedures should also specify all pricing requirements such as bonds, insurance, and administrative markups. If the change order work will impact the project schedule, the change order should specify the revised date for substantial completion of the project. Each type of change order requires specific change order approval procedures, summarized below.

Unforeseen site conditions. The contract must contain a specific provision in its entirety, found in M.G.L. c. 30, §39N, for adjusting the contract price where site

⁴⁷ If the change involves any substitution or elimination of materials, fixtures, or equipment, the certificate must state the reasons why such items were included in the first instance and the reasons for substitution or elimination.

conditions differ substantially or materially from the conditions indicated in the construction plans or contract documents. The provision states that either the awarding authority or the contractor may request an equitable adjustment in the contract price after discovery that the hidden physical conditions on the site differ from the construction plans or contract. The request must be in writing and must be made as soon as possible after discovery of the condition. The awarding authority must investigate the site conditions and, if the conditions cause an increase or decrease in the cost of the work, make an equitable adjustment in the contract price and modify the contract in writing. [M.G.L. c. 30, §39N]

Suspension, delay, interruption, or failure to act by the awarding authority.

The contract must also contain specific provisions in their entirety, found in M.G.L. c. 30, §39O, which allow the awarding authority, at its convenience, to suspend, delay, or interrupt the work. The provisions state that the general contractor must be informed in writing. If there is a suspension, delay, or interruption to the project of 15 days or more, or if the awarding authority fails to act in a timely manner as required by the contract, the awarding authority must make an adjustment in the contract price to cover increased costs of the general contractor. However, the price increases may not include profit to the general contractor.⁴⁸ [M.G.L. c. 30, §39O]

The contractor must submit the amount of the claim for increased costs to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption, or failure to act by the awarding authority. This claim must be submitted no later than the date of the final payment under the contract. The awarding authority may not approve any costs in the claim, except for costs due to a suspension order, that were incurred more than 20 days before the general contractor notified the awarding authority in writing of the awarding authority's act or failure to act. [M.G.L. c. 30, §39O]

⁴⁸ Note that the contractor is not entitled to increased costs for suspension, delay, interruption, or failure to act under this provision if the contractor is entitled to such increased costs under another provision of the contract.

Changes to plans and specifications. Changed circumstances may warrant owner-generated design changes, and incomplete or flawed plans and specifications may warrant contractor-generated design changes. Keep in mind that work performed under a change order will almost always cost more than the same work would have cost if it had been included in the original plans and specifications that were put out to bid. Two factors contribute to the high cost of change orders: noncompetitive pricing of the work and contractually required administrative markups.⁴⁹ If change orders are not carefully controlled, they can cause substantial project cost overruns. For this reason, change orders should be regarded as a last resort.

Note that you cannot use change orders to make substantial changes to the project scope. Massachusetts courts have held that amendments to publicly bid contracts must be incidental to the original contract scope. If the parties to the contract could negotiate major changes to the contract scope and price after the contract was signed, one of the purposes of the construction bid laws – to promote fair competition on a level playing field – would be undermined. Similarly, a competitively bid contract cannot later be renegotiated to incorporate fundamentally different business terms. We urge you to consult your local attorney with any questions about the legality of specific change order proposals.

149 30 Change Order Pricing

If the contract sets forth a basis for payment, such as an hourly rate for millwork or a unit price for gravel, the contract rate or unit price will be used to compute the price of the change order. If the contract contains no basis for payment, you will have to negotiate the change order price with the contractor. For some items or services, you may want to require the contractor to obtain competitive quotations. You may also want to obtain market prices independently in order to verify the reasonableness of the prices requested by the contractor. If the cost of a major change order appears excessive,

⁴⁹ Construction contracts typically permit the contractor and subcontractor to charge administrative fees based on a percentage of the cost of every service and item procured under a change order.

consider the feasibility of bidding the additional work or procuring the needed items separately after the construction project is completed. For all change order work, you should require the contractor to provide full documentation for each component of the work. If a change order results in an increase in the contract price for a city or town, the municipal auditor or accountant must also sign the change order, certifying that appropriated funds are available to cover the increased cost. [M.G.L. c. 44, §31C]

If the change order will entail a credit to your jurisdiction, you should take steps to verify that the dollar amount of the credit reasonably reflects the cost of the work being deleted from the construction contract. If you determine that the items or services to be deleted are worth significantly more than the credit offered by the contractor, it may make more sense to require the contractor to provide them than to delete them from the scope of the construction work.

149 **30** **Avoiding Change Orders**

Avoiding change orders means investing time and resources in the planning and design stages of the project. A careful study can help ensure that the final plans and specifications accurately reflect your jurisdiction's needs, thereby reducing the need for you to make changes to the design during construction. Similarly, a sufficiently detailed set of final plans and specifications will improve the contractor's ability to execute the project and coordinate the work of the subcontractors. One way to identify problems with the plans and specifications is to hold a prebid conference at which prospective bidders can raise questions or concerns about the bid documents. During the construction stage, requests from future users of the facility for design changes should be closely reviewed to determine whether the value to the project of the proposed changes exceeds their estimated construction cost.

149 **30** **Project Closeout**

As the construction project nears an end, the general contractor will notify you that the work is substantially complete. At this point the project manager, construction manager, and/or designer should inspect the project in order to verify that the project has reached

substantial completion. For building projects, “substantial completion” refers to the point at which either the value of the remaining work to be done is less than one percent of the original contract price or the awarding authority takes possession of the building for occupancy, whichever comes first. [M.G.L. c. 30, §39K] For public works projects, “substantial completion” refers to the point at which either the value of the remaining work to be done is less than one percent of the total contract price, including change orders, or substantially all of the work has been completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the contract. [M.G.L. c. 30, §39G]

The next step is to prepare a punch list detailing all of the remaining items that must be completed by the contractor before release of the final contract payment. Upon completion of the punch list items, the contractor will submit an invoice for final payment that includes any amounts that have been withheld from prior invoices.

149 30 Building Projects

State law requires the following final payment procedures for building projects: [M.G.L. c. 30, §39K]

- You must make payment on the contractor’s final invoice within 65 days after the project is 99 percent completed (or even earlier, if the contractor substantially completes the work and you as the awarding authority take possession). The designer will certify when the work is complete. This certification should be in writing.
- Continue to hold back funds to cover items you believe have not been satisfactorily completed, funds equal to your outstanding claims against the contractor, and funds for direct payment to subcontractors.⁵⁰
- Your contract must contain specific provisions, found in M.G.L. c. 30, §39K, detailing these final payment procedures. You have some recourse when a general contractor fails to complete a punch list after receiving a written notice. After a specific notice period, you may terminate the contract and complete the work at the expense of the original general contractor.

⁵⁰ M.G.L. c. 30, §39F specifies a procedure under which a subcontractor may seek direct payment from the owner if the subcontractor does not receive the contractually required payments from the general contractor.

30 Non-Building Projects

For non-building projects, state law requires a more complex process for project closeout and final payment procedure: [M.G.L. c. 30, §39G]

- Upon substantial completion of the project, the contractor must present written certification that the work is substantially complete. Within 21 days, you must respond to this certification by either sending the contractor a written declaration that the work is substantially complete, or an itemized list of incomplete or unsatisfactory items. If you choose to send an itemized list, you may also include a date by which the items must be completed, as long as that date is not before the contractual completion date. If you do not respond within 21 days, the contractor's certification that the work is complete becomes the effective declaration of substantial completion.
- Within 15 days of the effective declaration of substantial completion, you must send the contractor by certified mail, return receipt requested, a complete list of all incomplete or unsatisfactory work items. Unless delayed for reasons beyond the contractor's control, the contractor must complete the items listed within 45 days after receipt of the list (or by the contractual completion date, whichever is later). If the contractor fails to complete the work by then, you may cancel the contract and complete the incomplete or unsatisfactory work items at the contractor's expense, subsequent to seven days written notice by certified mail, return receipt requested.
- Within 65 days after the effective declaration of substantial completion, you must send the contractor a substantial completion estimate. This estimate will be the balance of the contract price minus a one percent retention for final completion, amounts to cover any outstanding claims, any amounts estimated to cover incomplete or unsatisfactory work, and the sum of all demands for direct payment made by subcontractors.⁵¹ If you fail to send a substantial completion estimate within 65 days, the amount owed to the contractor may be subject to interest charges.
- The contractor will send a notice when work is completed. Within 30 days after you receive the notice, you must send the contractor a final estimate for the contract balance due. If you determine that incomplete or unsatisfactory work remains, continue to hold back an amount you estimate would cover that work. If you fail to send the contractor a final estimate within 30 days, the amount may be subject to interest charges.

⁵¹ M.G.L. c. 30, §39F specifies a procedure under which a subcontractor may seek direct payment from the owner if the subcontractor does not receive the contractually required payments from the general contractor.

149 Evaluating the Contractor's Performance on Building Projects > \$25,000

Most public agencies in Massachusetts, including state agencies, cities, towns, and other public jurisdictions must complete a contractor evaluation upon completion of a M.G.L. c. 149 building project under their control. [M.G.L. c. 149, §44D(7)] An official from your jurisdiction or the architect or engineer responsible for oversight of the construction contract must certify in writing that the information contained on the contractor evaluation form represents, to the best of his or her knowledge, a true and accurate analysis of the contractor's performance on that contract. The completed evaluation is then sent to DCAM for use in deciding whether to certify that contractor to bid on future public building projects. A copy of the completed evaluation form must also be mailed to the contractor, who has 30 days in which to submit a written response to DCAM. [M.G.L. c. 149, §44D; 810 C.M.R. 4.08] The evaluation form contains written comments as well as numerical ratings reflecting the contractor's performance on the project. At approximately the 50 percent completion stage of a building project, the public owner is required to provide the contractor with a preliminary, informational, written evaluation of the contractor's performance on the project. The contractor evaluation form may be downloaded from DCAM's website at www.mass.gov/cam.

M.G.L. c. 149, §44D provides qualified immunity to individuals responsible for completing contractor evaluations on behalf of public owners. If a contractor initiates a lawsuit in response to a completed evaluation, the awarding authority is required to provide legal representation and indemnification for the individual completing the evaluation on behalf of the awarding authority.

The contractor certification system relies heavily on the written evaluations of past contractor performance provided by public owners. When public owners fail to provide DCAM with the required written evaluations or provide inaccurate information to DCAM regarding contractor performance, the likelihood increases that marginal or unreliable contractors will be certified to bid on public building projects. Your cooperation in providing DCAM with accurate information on each general contractor's performance is

essential to protecting public jurisdictions – including your own – from substantial risks posed by unqualified contractors.

Any public agency that fails to complete the required contractor evaluation and submit it to DCAM, together with any written response by any contractor, within 70 days of completing a project will be ineligible to receive any state funds for public building or public works projects. [M.G.L. c. 149, §44D]

149 **30**

Invoking the Performance Bond

If the contractor fails to complete the project in a satisfactory manner, you may need to invoke the contractor's performance bond.⁵² In such cases, the surety that issued the bond is responsible for the cost of completing the work. Typically the surety will arrange for another contractor to complete the work. Attempts to invoke a performance bond will usually involve extensive negotiations with the contractor and the surety, so you should seek assistance from your local attorney as early in the process as possible. Note that the performance bond must remain in effect for at least one year after the project's completion, and longer if necessary, to cover guarantees or pending claims. [M.G.L. c. 30, §40]

⁵² As discussed earlier in this chapter, the performance bond for a M.G.L. c. 149 contract must be in the amount of the full contract price. M.G.L. c. 30, §39M contracts do not require performance bonds; however, you may require one if you so choose.

VII. Procuring Modular Construction

Public agencies may procure modular buildings by following an alternative procurement process contained in M.G.L. c. 149, §44E(4). These procedures apply to the acquisition and installation of modular buildings, including the solicitation and evaluation of proposals, the award of contracts, and the installation of modular units.

The purpose of the modular procurement law is to allow awarding authorities to choose this alternative to the conventional mode of building construction by following specific planning and contracting procedures that ensure fair competition. This law, like other public construction laws, is intended to deliver facilities that are properly designed and built, at a fair cost, in a reasonable and controlled time period.

Projects Covered by the Modular Procurement Law

The modular procurement law defines a modular building as a predesigned building or units of a predesigned building assembled and equipped with internal plumbing, electrical or similar systems prior to movement to the site where such units are attached to each other and the building is affixed to a foundation and connected to external utilities. The modular procurement law also applies to any portable structure with walls, a floor, and a roof, designed or used for the shelter of persons or property, transportable in one or more sections and affixed to a foundation and connected to external utilities. Generally, modular construction involves the manufacture and transport of sectional units from a factory to another site where the units are connected. Site preparation work, construction of foundations, and attachment of modular buildings to utilities can be included as part of the modular building procurement, or can be bid separately through the conventional construction bidding procedures.

Modular construction departs from the design-bid-build process in several respects. Design and construction of the prefabricated modular units are combined in the manufacturing process, and specialized subtrade work may be done by the manufacturer, so there is no separate filed sub-bid procedure. The modular construction

procurement process is also different. Instead of selecting a designer to prepare detailed plans and specifications for the construction work, you issue a request for proposals (RFP) for modular construction that describes the project requirements in detail, lists all criteria that will be used to compare competing proposals, and states all of the terms and conditions that will apply to the procurement. Each responsive offeror submits a proposal to provide a predesigned building (or buildings) that meets the stated requirements, in accordance with the terms set forth in the RFP. A proposal is then selected through the evaluation process described in this chapter.

Leasing Modular Buildings

You must follow the modular procurement procedures if you lease a modular building. [M.G.L. c. 149, §44E(4)] All terms and conditions of the lease arrangement must be included in the RFP.

Repair and Maintenance of Modular Buildings

Repair and maintenance services for an existing modular building are subject to the designer selection and construction bid laws discussed in Chapters II and V of this manual unless the work will be performed under a warranty agreement procured under the original contract.

Planning for Modular Construction

Modular buildings are usually considered for one or more of the following reasons: portability, speed of construction, low initial cost, and availability of financing options such as lease-purchase financing. In addition to these factors, however, you should also weigh possible trade-offs, such as energy efficiency, maintenance costs, durability, and acceptability to the community. Do not rely on information from modular industry sales representatives to assess these trade-offs.

The best way to evaluate the benefits of modular construction is to undertake a study that assesses all of the feasible alternatives, including both conventional and modular construction, and other options such as leasing space until new construction can be completed. (Chapter III of this manual provides detailed information on preparing a

study.) The study will also define the program requirements of the project and provide you with cost estimates. Keep in mind that modular buildings may provide an immediate, temporary solution to a space shortage, but the long-term costs of this approach may be significantly higher than for other approaches. The study should clarify these costs and trade-offs.

It is generally advisable to contract with a design professional to prepare the study. In addition, you will likely need to contract with a design professional to prepare the RFP and evaluate the proposals.

Emergencies

As in the case of nonmodular building construction services, you may make an emergency modular procurement only for the work that is necessary to preserve the health or safety of persons or property in an emergency. Under the emergency provisions of the law, you may award the emergency contract on the basis of such competitive bids or proposals as you are able to obtain in time to address the extreme emergency, without a public opening of the bids or proposals. The prior approval of the Division of Capital Asset Management (DCAM) is required unless the urgency of situation makes it impossible to contact DCAM in advance. In that event, emergency work can be started, but DCAM must be notified as soon as possible. DCAM must also waive the public notice requirement. [M.G.L. c. 149, §§44J(1), (6)] Not every urgent situation will meet the legal definition of an emergency. (Chapter V of this manual contains more information on emergency construction contracting.)

Modular Construction Project Oversight

Like a conventional construction project, a modular construction project requires oversight of every stage, including the site preparation work, the construction of foundations, the installation and assembly of the modular units, and the attachment to utilities. You may want to consider hiring or contracting with a professional project manager who is knowledgeable and experienced in modular construction.

Modular Procurement: The Basic Steps

This section describes the basic steps in the modular procurement process, which are listed below.

Step	Page
1. Document your decision to replace a modular building (if necessary).	96
2. Prepare the RFP.	96
3. Provide public notice of the RFP.	97
4. Distribute the RFP.	97
5. Designate the individual(s) responsible for evaluating proposals.	98
6. Receive the sealed price and non-price proposals.	98
7. Open and register the proposals.	98
8. Evaluate non-price proposals.	99
9. Evaluate the price proposals.	101
10. Identify the most advantageous proposal.	101
11. Negotiate changes (if any) to the proposal.	102
12. Award the contract.	102

Step 1: Document your decision to replace a modular building (if necessary).

If you are procuring a modular building to replace another modular building, M.G.L. c. 149, §44E(4) requires you to certify that such a replacement is necessary, cost-effective over the long-term, and not detrimental to public policy and to provide a detailed written explanation of your reasons for such certification.

Step 2: Prepare the RFP.

A modular building RFP should provide a detailed description of the proposed project, including all program and preliminary design requirements. The level of design detail contained in the RFP will typically consist of plans and specifications that resemble schematic design documents. These technical specifications should be prepared by a qualified design professional. You may want to involve the same design professional in the evaluation of proposals to ensure that the proposal you choose meets your technical requirements. Chapter IV provides more information on procuring design services.

In addition to the technical specifications, the RFP should contain objective criteria that will be used to evaluate and rate the proposals. The evaluation criteria should focus primarily on the proposer's past performance and on the performance of similar modular buildings fabricated by the same manufacturer.

Proposers for a modular building contract must be certified by DCAM to perform modular construction. In addition to requiring a Certificate of Eligibility and an Update Statement, you should obtain information about the proposer's past performance and the performance of the proposed manufacturer's buildings from references provided by each proposer. The references should be from public and private owners of comparable modular building projects.

M.G.L. c. 149, §44E(4) lists the information that must be contained in the RFP. The RFP must require proposals to be submitted in two parts, in separate, sealed envelopes: a non-price proposal and a price proposal. A detailed listing of the RFP contents and a model RFP for modular construction are provided in Appendix E of this manual.

Step 3: Provide public notice of the RFP.

You must publish the RFP advertisement at least once in the *Central Register* and in a local newspaper not less than two weeks prior to the proposal deadline. In addition, you must post the advertisement in the offices of the awarding authority at least one week prior to the deadline. [M.G.L. c. 149, §44J] The advertisement should describe the overall project in sufficient detail to allow offerors to determine whether they are qualified and wish to submit proposals. It should also state when and where the RFP can be obtained, the deadline and place for submission of proposals, and the time and place for the opening of proposals. If a preproposal meeting will be held, the advertisement should list the time and place of that meeting.

Step 4: Distribute the RFP.

You must make the RFP available on an equal basis to all who request a copy. If you charge vendors a fee for copies of the RFP, you must charge all vendors. Keep a

record of all vendors who receive the RFP. If you later issue an addendum to the RFP, send the addendum to all those who have already received the RFP. To avoid misunderstandings or protests, include a requirement in the RFP that vendors acknowledge in writing their receipt of any addenda. Also, if vendors are likely to require additional time to respond to the addendum, extend the proposal due date.

Step 5: Designate the individual(s) responsible for evaluating proposals.

You must select one or more individuals to evaluate the non-price proposals. The evaluators should include a qualified design professional.

Step 6: Receive the sealed price and non-price proposals.

You must maintain a register of proposals received. It is good practice to note on the sealed price and non-price proposal packages the date and time they were received, and to provide proposers with receipts for their proposals upon request.

Prior to opening the non-price proposals, a proposer may correct, modify, or withdraw the proposal (non-price and price). Any correction or modification to a proposal must be submitted in writing. Because the original proposals must be submitted as sealed packages, the RFP should require that corrections or modifications also be sealed when submitted.

You may not accept a late proposal. If you do receive a late proposal, you should note the time of receipt and return the proposal unopened to the proposer .

You may not accept a late correction or modification to a proposal. If you do receive a late correction or modification, you should treat it as a late proposal, and evaluate only the original proposal that was received by the deadline.

Step 7: Open and register the proposals.

You *may not* open the proposals publicly. The proposal contents are to be kept confidential and not disclosed to competing proposers until the evaluation process is completed or until the time for acceptance specified in the RFP, whichever occurs first.

You must separate the price and non-price proposals. The non-price must be opened at the time specified in the RFP in the presence of one or more witnesses. At the time of the opening, you must prepare and make available for public inspection a register of proposals, which includes the name of each proposer and the number of proposal modifications submitted by each proposer. You should also record the name(s) of the witness(es).

You may open the price proposals immediately after opening the non-price proposals or at a later time. However, be sure that you do not disclose the price proposals to the non-price proposal evaluator(s) until they have completed their evaluations. The separation of non-price and price proposals is an important element of the RFP process. The process is structured to allow an orderly, fair comparison of the proposals.

A proposal may be withdrawn after it has been opened only if a mistake is clearly evident on the face of the document, but the intended correct answer is not evident. For example, if a proposer incorrectly multiplied unit prices by estimated quantities and added the incorrect subtotals to arrive at a total price, the mistake would be evident but the intended proposal would not.

Step 8: Evaluate non-price proposals.

After opening the non-price proposals, the evaluators should first examine each proposal to determine whether it is responsive to the RFP requirements. A proposal should include specifications for a modular building or buildings that meet all of the requirements set forth in the RFP, as well as the required Certificate of Eligibility and Update Statement. A proposal that does not meet requirements specified in your RFP is nonresponsive and should be rejected.

In determining the responsiveness of a proposal, however, you must waive or allow the offeror to correct minor informalities. Minor informalities are errors of form that do not cast doubt on the intended meaning of the proposal or the qualifications of the offeror. If a mistake and the intended offer are clearly evident in a proposal, you must correct

the mistake to reflect the offeror's intent, and notify the offeror in writing of the correction. In the event that a mistake is evident, but the correct intended offer is not, you may permit the offeror to withdraw the proposal.

After rejecting the nonresponsive non-price proposals, the evaluators then evaluate and rate the responsive proposals. The law requires evaluators to:

- Assign each proposal a rating of highly advantageous, advantageous, not advantageous, or unacceptable for each evaluation criterion, and the reasons for each rating.
- Assign each proposal a composite rating, and the reasons for this rating.
- Note any recommendations for revisions to the proposed plan for providing modular buildings, to be obtained by negotiation prior to awarding a contract.
- Verify whether the modular buildings were or will be manufactured within the Commonwealth, and if not, whether they were or will be manufactured within the United States.

The rating system embodied in this legislation discourages assigning numerical values to ratings. The ratings are expressed in qualitative terms because they reflect your evaluators' qualitative judgments. The evaluators have the discretion to determine whether changes in the offeror's proposal would render it more advantageous; if so, the evaluators should note in the written evaluation the necessary changes. The award of a contract should be conditioned on the negotiation of the changes noted in the evaluation, provided the offeror agrees to make these revisions without increasing the cost. [M.G.L. c. 149, §44E(4)]

Once ratings have been assigned on each criterion, evaluators assign an overall rating to each proposal and explain in writing their reasons for their composite rating of each proposal. The reasons should reflect the relative importance of the evaluation criteria.

Alternatively, a review of the Update Statement may raise doubts about an offeror's qualifications, but the evaluators may decide that disqualification is not warranted. (The Update Statement is discussed in more detail in Chapter V). The modular procurement

procedures allow evaluators to assign ratings to offerors' qualifications and to consider the relative ratings in this category when choosing the most advantageous proposal.

Step 9: Evaluate the price proposals.

You will evaluate the price proposals following the method you specified in the RFP to determine the best proposal price. The price evaluation can be performed while non-price proposals are being evaluated as long as the prices are not disclosed to the individuals responsible for evaluating the non-price proposals. Evaluators will first determine whether each price proposal meets the submission requirements and includes the required bid deposit. Evaluators will then compare the proposal price with the Single Project Limit and Aggregate Work Limit listed on the offeror's Certificate of Eligibility, to ascertain whether the offeror is eligible for a contract award. (Chapter V provides additional information on the Single Project Limit and Aggregate Work Limit.)

As in the case of the non-price proposals, you must waive or allow the offeror to correct minor informalities. For example, the omission of a unit price figure is a minor informality that must be waived if the intended figure is readily ascertainable from other figures in the proposal. If a mistake and the intended offer are clearly evident in a proposal, you must correct the mistake to reflect the offeror's intent and notify the offeror in writing of the correction. In the event that a mistake is evident, but the correct intended offer is not, you may permit the offeror to withdraw the proposal. For example, an offeror might incorrectly multiply unit prices by estimated quantities and then add the incorrect subtotals to arrive at a total price. In this case, the mistakes are evident, but the intended offer is not.

Step 10: Identify the most advantageous proposal.

You must identify the most advantageous proposal, taking into consideration the proposal evaluations and the proposal prices. The decision may be easy when, for example, the lowest-priced proposal receives the highest overall ratings, or all proposals receive the same rating and the differences are so insignificant that you decide to select the lowest-priced proposal.

In other cases, you will have to carefully consider whether it is worthwhile for your jurisdiction to spend more money for a better proposal. For example, if one proposal is rated “highly advantageous” and has a higher price than the lowest-priced “advantageous” proposal, you need to determine which proposal best meets the needs of your jurisdiction.⁵³ The extra benefits afforded by the “highly advantageous” proposal may or may not be worth the cost premium you would incur by selecting that proposal. There is no mechanical process for making the tradeoff.

Step 11: Negotiate changes (if any) to the proposal.

The awarding authority may condition the award on successful negotiation of any revisions recommended in the evaluation, but these negotiations are limited in scope. The only items that are subject to negotiation are the specific revisions noted by the evaluators during the evaluation process. If any of the proposal revisions recommended by the evaluators are not included in the contract, the reasons for omitting them should be stated in writing. Contract terms, scope of work, and price are *not* subject to negotiation. You may not agree to pay more than the offeror’s proposal price for changes needed to make the proposal comply with the RFP requirements, nor is it permissible to adjust the price indirectly (for example, reducing the scope of work or the contractor’s responsibilities or quality of the product). To allow one offeror to change a proposal price or any other term of the RFP would violate the precepts of fair competition.

Step 12: Award and publicize the contract.

You must give written notice of the award decision to the selected proposer within the time for acceptance that you specified in the RFP. The time for acceptance may be extended by agreement of the parties.

⁵³ If revisions to a proposal’s plan for providing the modular buildings would result in its selection as most advantageous, taking into consideration the proposal evaluations and prices, you may select the proposal conditioned upon satisfactory negotiations to incorporate the recommended revisions.

If you do not award the contract to the offeror who submitted the lowest price, you must explain the reasons for the award in writing and retain this written explanation in your files for at least six years from the date of final payment under the contract.

Finally, the name of the firm awarded the contract should be published in the *Central Register*. A form for this purpose may be downloaded from the Secretary of the Commonwealth's website at www.mass.gov/sec.

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Appendix A: Additional Sources of Assistance

This directory lists some major state agencies and offices that are involved in the public construction process. Feel free to contact them or visit their Internet sites for further information and advice.

Office of the Attorney General

Enforces and interprets the public construction bid laws, designer selection, and the prevailing wage law.

Office of the Attorney General
Fair Labor and Business Practices Division
200 Portland Street
Boston, MA 02114
Telephone: (617) 727-3465
Fax: (617) 722-3066
Internet: www.mass.gov/ag

Board of Building Regulations and Standards

Regulates state building code requirements; maintains current lists of Massachusetts certified producers of manufactured buildings and of licensed Third Party Inspection Agencies for Massachusetts Manufactured Building Program.

Executive Office of Public Safety
Board of Building Regulations
and Standards
One Ashburton Place, Room 1301
Boston, MA 02108
Telephone: 617-727-7532
Fax: (617) 227-1754
Internet: www.mass.gov/bbrs

Central Register

Published by the Secretary of the Commonwealth. The website contains forms you may download, complete, and submit for publication.

Secretary of the Commonwealth
State Publication & Regulations Division
One Ashburton Place
Room 1613
Boston, MA 02108
Telephone: (617) 727-9136
Fax: (617) 742-4822
Email: regs@sec.state.ma.us
Internet: www.mass.gov/sec/spr

Division of Capital Asset Management (DCAM)

Formerly the Division of Capital Planning and Operations (DCPO). Supervises design and construction of state building projects, certifies contractors, issues emergency waivers for construction. For emergencies and contractor certification information, select the Office of the General Counsel from the automated voice messaging system at the Division's general number.

Division of Capital Asset Management
One Ashburton Place
Room 1505
Boston, MA 02108

Telephone: (617) 727-4050
Fax: (617) 727-5363

Email: info@state.ma.us
Internet: www.mass.gov/cam

Designer Selection Board (DSB)

Selects designers for state and county building projects and for municipal and district projects on request, issues designer selection guidelines.

Designer Selection Board
One Ashburton Place
Room 1609
Boston, MA 02108

Telephone: (617) 727-6008

Internet:
www.mass.gov/camabout/ov_designer.html

Division of Energy Resources

Enforces and interprets M.G.L. c. 25A, which governs the procurement of energy management services contracts. Provides technical assistance on energy-saving improvements.

Division of Energy Resources
70 Franklin Street
7th Floor
Boston, MA 02110

Telephone: (617) 727-4732
Fax: (617) 727-0030

Internet: www.mass.gov/doer

State Ethics Commission

Administers and enforces financial disclosure and conflict-of-interest laws, renders written advisory opinions upon request.

State Ethics Commission
One Ashburton Place
Room 619
Boston, MA 02108

Telephone: (617) 727-0060
Fax: (617) 723-5851

Internet: www.mass.gov/ethics

Massachusetts Highway Department (MassHighway)

Oversees, funds, and prequalifies contractors for certain highway construction projects.

MassHighway
10 Park Plaza, Suite 3510
Boston, MA 02116

Telephone: (617) 973-7800
Fax: (617) 973-8040
Internet: www.mass.gov/mhd

Department of Housing and Community Development (DHCD)

Oversees and funds certain public housing projects.

Department of Housing and
Community Development
One Congress Street
10th Floor
Boston, MA 02114

Telephone: (617) 727-7765
Fax: (617) 727-5060
Internet: www.mass.gov/dhcd

Office of the Inspector General

Provides training and technical assistance to public agencies, certifies public purchasing officials through the MCPPO program, conducts performance reviews, investigates complaints and allegations of wrongdoing.

Office of the Inspector General
One Ashburton Place
Room 1311
Boston, MA 02108

Telephone: (617) 727-9140
Hotline: (800) 322-1323
Fax: (617) 723-2334
Internet: www.mass.gov/ig

Department of Labor and Workforce Development

Establishes prevailing wage rates, issues licenses for asbestos and lead work, provides apprentice training registration.

Division of Occupational Safety
Department of Labor and
Workforce Development
399 Washington Street
5th Floor
Boston, MA 02108
Telephone: (617) 727-7047 or
(617)-727-1933 or (800)-425-0004
Fax: (617)-727-7568

Internet: www.mass.gov/dos

Division of Professional Licensure

Includes 32 boards of professional licensure that license and maintain lists of registered architects, engineers, land surveyors, and landscape architects.

Division of Professional Licensure
239 Causeway Street
Boston, MA 02114

Telephone: (617) 727-3074

Fax: (617) 727-2197

Internet: www.mass.gov/reg

School Building Assistance Program

Funds and regulates state reimbursement for school construction projects through the Department of Education's School Business Services Division.

Massachusetts Department of Education
School Building Assistance Program
350 Main Street
Malden, MA 02148-5023

Telephone: (781) 338-6526

Fax: (781) 338-6530

Email: sba@doe.mass.edu

Internet:

http://finance1.doe.mass.edu/sbuilding/1_sbuilding.html

Appendix B: Statutory Forms

Forms

Form for General Bid	B-3
Form for Sub-Bid	B-5

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FORM FOR GENERAL BID

To the Awarding Authority:

A. The Undersigned proposes to furnish all labor and materials required for _____(project) in _____, Massachusetts, in accordance with the accompanying plans and specifications prepared by _____ (name of architect or engineer) for the contract price specified below, subject to additions and deductions according to the terms of the specifications.

B. This bid includes addenda numbered _____

C. The proposed contract price is _____ dollars (\$_____).

For alternate No. _____ Add \$_____; Subtract \$_____

(Repeat preceding line for each alternate)

D. The subdivision of the proposed contract price is as follows:

Item 1. The work of the general contractor, being all work other than that covered by Item 2. \$_____

Item 2. Sub-bids as follows: –

Sub-trade	Name of Sub-bidder	Amount	Bonds required, indicated by "Yes" or "No"
_____	_____	\$ _____	_____
_____	_____	\$ _____	_____
Total of Item 2		\$ _____	_____

The undersigned agrees that each of the above named sub-bidders will be used for the work indicated at the amount stated, unless a substitution is made. The undersigned further agrees to pay the premiums for the performance and payment bonds furnished by sub-bidders as requested herein and that all of the cost of all such premiums is included in the amount set forth in Item 1 of this bid.

The undersigned agrees that if he is selected as general contractor, he will promptly confer with the awarding authority on the question of sub-bidders; and that the awarding authority may substitute for any sub-bid listed above a sub-bid filed with the awarding authority by another sub-bidder for the sub-trade against whose standing and ability the undersigned makes no objection; and that the undersigned will use all such finally selected sub-bidders at the amounts named in their respective sub-bids and be in every way as responsible for them and their work as if they had been originally named in this general bid, the total contract price being adjusted to conform thereto.

FORM FOR GENERAL BID – PAGE 2

- E. The undersigned agrees that, if he is selected as general contractor, he will within five days, Saturdays, Sundays and legal holidays excluded, after presentation thereof by the awarding authority, execute a contract in accordance with the terms of this bid and furnish a performance bond and also a labor and materials or payment bond, each of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority and each in the sum of the contract price, the premiums for which are to be paid by the general contractor and are included in the contract price.

The undersigned hereby certifies that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work and that he will comply fully with all laws and regulations applicable to awards made subject to section forty-four A.

The undersigned further certifies under the penalties of perjury that this bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this subsection the word "person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity. The undersigned further certifies under penalty of perjury that the said undersigned is not presently debarred from doing public construction work in the commonwealth under the provisions of section twenty-nine F of chapter twenty-nine, or any other applicable debarment provisions of any other chapter of the General Laws or any rule or regulation promulgated thereunder.

Date _____

(Name of General Bidder)

By _____
(Name of Person Signing Bid and Title)

(Business Address)

(City and State)

FORM FOR SUB-BID

To all General Bidders Except those Excluded:

- A. The undersigned proposes to furnish all labor and materials required for completing, in accordance with the hereinafter described plans, specifications and addenda, all the work specified in Section No. _____ of the specifications and in any plans specified in such section, prepared by _____ (name of architect or engineer) for _____ (project) in _____ (city or town), Massachusetts, for the contract sum of _____ dollars (\$_____).

For Alternate No. _____; Add \$_____ Subtract \$_____

[Repeat preceding line for each alternate]

- B. This sub-bid includes addenda numbered _____

- C. This sub-bid

☐ may be used by any general bidder except:

☐ may only be used by the following general bidders:

[To exclude general bidders, insert "X" in one box only and fill in blank following that box. Do not answer C if no general bidders are excluded.]

- D. The undersigned agrees that, if he is selected as a sub-bidder, he will, within five days, Saturdays, Sundays and legal holidays excluded, after presentation of a subcontract by the general bidder selected as the general contractor, execute with such general bidder a subcontract in accordance with the terms of this sub-bid, and contingent upon the execution of the general contract, and, if requested so to do in the general bid by such general bidder, who shall pay the premiums therefor, furnish a performance and payment bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority, in the full sum of the subcontract price.

FORM FOR SUB-BID – PAGE 2

- E. The names of all persons, firms and corporations furnishing to the undersigned labor or labor and materials for the class or classes or part thereof of work for which the provisions of the section of the specifications for this sub-trade require a listing in this paragraph, including the undersigned if customarily furnished by persons on his own payroll and in the absence of a contrary provision in the specifications, the name of each such class of work or part thereto and the bid price for such class of work or part thereof are:

Name	Class of Work	Bid price
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

[Do not give bid price for any class or part thereof furnished by undersigned.]

- F. The undersigned agrees that the above list of bids to the undersigned represents bona fide bids based on the hereinbefore described plans, specifications and addenda and that, if the undersigned is awarded the contract, they will be used for the work indicated at the amounts stated, if satisfactory to the awarding authority.
- G. The undersigned further agrees to be bound to the general contractor by the terms of the hereinbefore described plans, specifications, including all general conditions stated therein, and addenda, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.
- H. The undersigned offers the following information as evidence of his qualifications to perform the work as bid upon according to all the requirements of the plans and specifications: –

1. Have been in business under present business name _____ years.
2. Ever failed to complete any work awarded? _____
3. List one or more recent buildings with names of the general contractor and architect on which you served as a sub-contractor for work of similar character as required for the above-named building.

	Building	Architect	General Contractor	Amount of Contract
(a)	_____	_____	_____	_____
(b)	_____	_____	_____	_____
(c)	_____	_____	_____	_____

4. Bank reference _____

FORM FOR SUB-BID – PAGE 3

- I. The undersigned hereby certifies that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work and that he will comply fully with all laws and regulations applicable to awards of subcontracts subject to section forty-four F.

The undersigned further certifies under penalties of perjury that this sub-bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this subsection the word "person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity. The undersigned further certifies under penalty of perjury that the said undersigned is not presently debarred from doing public construction work in the commonwealth under the provisions of section twenty-nine F of chapter twenty-nine, or any other applicable debarment provisions of any other chapter of the General Laws or any rule or regulation promulgated thereunder.

Date_____

(Name of Sub-bidder)

By _____
(Title and Name of Person Signing Bid)

(Business Address)

(City and State)

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Appendix C: Designer Selection Board Guidelines

The guidelines on the following pages have been issued by the Designer Selection Board to assist municipalities in preparing their own designer selection procedures. See Chapter II of this manual for additional information on preparing designer selection procedures.

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The Commonwealth of Massachusetts

Executive Office for Administration and Finance

Designer Selection Board

One Ashburton Place, Room 1609

Boston, Massachusetts 02108

MITT ROMNEY
GOVERNOR

KERRY HEALEY
LIEUTENANT GOVERNOR


TEL: (617) 727-4046

FAX: (617) 727-0112

DAVID B. WEINER, P.E.
CHAIRMAN

GORDON P. SAINSBURY, AIA; RIBA
EXECUTIVE DIRECTOR

TO: Cities and Towns

FROM: Gordon P. Sainsbury, AIA; RIBA 
Executive Director
Designer Selection Board

SUBJECT: Designer Selection Board Guidelines for a City and Town Building Project

DATE: February 1, 2003

It is the intention of this memorandum to briefly explain the relationship between local authorities and the State Designer Selection Board and to provide local authorities with answers to a number of common and recurring questions regarding the proper application of designer selection statutes and procedures to the planning and design of local building projects.

Local authorities should be thoroughly familiar with the following provision of Chapter 7, Section 38K (a) of the General Laws:

"Every contract for design services for any building construction, reconstruction, alteration, remodeling, or repair estimated to exceed one hundred thousand dollars (\$100,000) by any city, town or agency, board, commission, authority or instrumentality thereof, other than housing authorities shall be awarded only after a selection procedure adopted in writing, prior to publication requesting applications, complying with the purposes and intent of sections thirty-eight A1/2 to thirty-eight O, inclusive, and the following requirements."

The remainder of Section 38K (a) explains the specific minimum procedural requirements that must be satisfied to properly obtain proposals from designers. The State Designer Selection Board is responsible for publishing guidelines to assist public agencies not within the Board's direct jurisdiction (cities and towns) in the establishment of a professional and independent designer selection procedure consistent with the provisions and intent of the State designer selection statutes.

To carry out this advisory role, the State Designer Selection Board has issued the enclosed guidelines. They are revised as necessary, to all cities and towns. **This issue updates the most recent issues (October 1, 1994).**

If you have any questions, please contact this office or our internet address at www.mass.gov/cam. You may also contact the Inspector General's Office for additional information at One Ashburton Place, Room 1311, Boston, MA 02108, (617) 727-9140, Internet address is www.mass.gov/ig.

GPS/cgh
Enclosure(s)

The Designer Selection Board receives a large number of questions from local authorities related to the adoption or application of designer selection procedures to various situations. The following questions and answers represent those issues that are most often raised by cities and towns. The Board hopes that the answers will provide you with either specific or general direction in your efforts to properly comply with the designer selection requirements.

- 1. Is the employment of an educational programmer or planner considered a design service requiring public advertisement in accordance with approved designer selection guidelines?**

ANSWER: No, unless the scope of services originally contemplates or develops into an evaluation of an existing facility or a new facility to determine the feasibility and costs of renovation, and/or to determine the feasibility and costs of constructing an addition or new facility. Where the services include what is conventionally termed an "architectural" program, the designer selection procedures apply.

- 2. Is there a minimum dollar threshold that must be exceeded before a formal designer selection procedure must be followed?**

ANSWER: The law requires that whenever the design fee is estimated to cost \$10,000 or more, or whenever the estimated construction cost of a project is \$100,000 or more and design services are required, a designer selection procedure must be followed.

- 3. Is a feasibility study required prior to the employment of a designer to prepare development plans and specifications and/or construction documents?**

ANSWER: A study is not required on local building projects. However, it is highly recommended that a study be completed before designing any project of substantial magnitude. The advantage of obtaining a comprehensive evaluation of the existing facility and/or proposed scope of work including consideration of feasible alternatives and related estimated costs cannot be understated. Without the benefit of this basic information, hiring a designer to prepare final contract documents at a fixed limit cost of construction for a pre-designated lump sum design fee is seldom prudent.

- 4. What is a reasonable fee to establish for the study, the design of construction documents and the administration of construction?**

ANSWER: Chapter 7, section 38G (c) states:

"All fees shall be stated in designer's contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services."

Common practice does allow the establishment of a ceiling amount in the designer's contract often referred to as an "upset amount", with actual payments being made for design services rendered on an hourly basis. This method of payment is normally used on "study projects" where the extent and difficulty of the work effort is unknown. The maximum hourly rate established on DCAM State projects is 2.75 times payroll costs not to exceed \$125/hr. The standard method of payment of a lump sum design contract is attached.

- 5. Can the firm that completes the study also be employed to complete the design and administer the construction contract?**

ANSWER: Yes, the designer selection law permits municipalities to contract with the same designer for both the study and the subsequent design provided the following conditions are applied:

- a. Designers performing studies for repair work may be continued to provide design services, provided, first, that such work is limited to identifying and correcting existing deficiencies in a portion of a building or its equipment; and second, that the designer's fee for the combined study and design of repairs is not greater than one hundred thousand dollars.
- b. Awarding authorities in cities and towns may allow a designer who conducted a feasibility study to continue with the design of a project if the authority commissions an independent review, by a knowledgeable and competent individual or business doing such work, of the feasibility designer's work to insure its reasonableness and its adequacy prior to allowing the designer to continue into the design development phase of the project. The review of a State agency with oversight or approval of a project may be sufficient for the purposes of this paragraph.

6. Can cities and towns use donated services or in-house staff for design or/or construction?

ANSWER: It appears that there are no legal restrictions against town employees or citizens from donating design services for public projects. Serious ramifications could develop, however, if any injury to an individual or property developed and that injury was due to errors or omissions in the design of the project. Furthermore, a design should not be permitted to "donate services" during an early stage of a project and then be continued by the awarding authority, on a fee basis, to a later stage of the design.

7. Can a building project be subdivided into its component parts with provisions for donated time and materials to be combined with a general contractor's bid and construction of other major components?

ANSWER: Although a public authority may accept donated time and materials, the administration and coordination of different building components, i.e., roofing, electrical, plumbing, heating, etc. should be coordinated by a professional architect or engineer possessing the experience and expertise of providing contract documents that are in conformance with the new Massachusetts State Building Code and also Mass. General Laws, Chapter 149, Section 44A to 44H, Section 44M, and Chapter 30, Section 39M, commonly known as the "bidding statutes". Dividing projects into smaller components, merely to avoid threshold limits that trigger enactment of competitive bidding statutes, is prohibited by law. Awarding authorities should proceed cautiously whenever a proposal is made to divide responsibilities for design and construction of a project by individual construction of building components on building projects.

8. Can cities or towns request applicants for building projects to submit a fee proposal?

ANSWER: While there are no express provisions in the designer statutes that prohibits cities and towns from receiving competitive fee proposals from designers proposing to perform services related to a building project, there is a specific procedure to follow when an awarding authority intends to negotiate a fee. An argument can be made that the receipt of competitive fee proposals, prior to evaluating applicants, is contrary to the statutory provisions governing both the criteria for selecting designers and the method for determining the appropriate amount of a design fee. The Ward Commissions Final Report concluded that the receipt of competitive fee proposals was not

in the overall public interest. The Inspector General adopted the position that public agencies are prohibited from receiving competitive fee proposals from designers.

The statutes state that:

"all fees must be stated in designer's contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services."

The total dollar fee amount may be set by the awarding authority prior to the receipt of applications from interested designers, or it may be negotiated. Designers should be reviewed and ranked on the basis of qualifications not on the basis of the fee proposals.

If the public agency determines that the fee is to be negotiated, the awarding authority must first establish a maximum fee, which cannot be exceeded during negotiations. The awarding authority should then negotiate with the first ranked designer and if that negotiation fails then initiate negotiations with the second ranked designer and if again unsuccessful, proceed to the third ranked designer. The procedures as outlined in Mass. General Laws Chapter 7, 38G (b) should be followed, which provides in part:

"The Commissioner (or Public Agency) may require a finalist with whom a fee is being negotiated to submit a fee proposal and include with it such information as the Commissioner (or Public Agency) requires to provide current cost and pricing data on the basis of which designer's fee proposal may be evaluated."

The public agency remains under an obligation to attempt to negotiate a satisfactory design fee with the first ranked designer before proceeding to negotiate with the next highest ranked designer.

Instructions for the Calculation of Designer Fees
Division of Capital Asset Management
January 2003

The attached fee schedule, as shown in *Table I: Designers Base Fee as a Percentage of the FLCC by Building Type*, is to be used for the calculation of all designer fees, designer fee revisions, and lump sum fees negotiated with DCAM house doctors.

If, during design a change in fee is required (either an increase or decrease), the change should be based on a change in scope approved by the director, *not* a change in the FLCC.

The following are guidelines for establishing design fees for publicly funded building projects.

1. Project FLCC:

The Fixed Limit Construction Cost (FLCC) is:

- (a) listed in the DSB ad for the project, or
- (b) if a house doctor is used, is based on the FLCC listed in the certified study, or
- (c) as revised from a) or b) above and approved by the Director.

2. Basic Design Fee:

The basic design fee is calculated as a percentage of the fixed limit construction cost (FLCC) of the project. The appropriate percentage can be found in Table I by cross referencing the project complexity (Class I-V) and the FLCC. The exact amount of the fee may be adjusted by extrapolation between the FLCC's as listed.

If all or a major portion of the project involves major renovation of a building add 0.5% to the designer's fee. Building repairs should not be considered as renovation work. The Design Contract (DCAM C-2) defines the responsibilities of the designer.

3. Additions to the Basic Design Fee

- a.) Extra Compensation (defined by Article 11 of DCAM C-2 contract). These services are negotiated as needed and may include:
 - design fee for design and selection of Furniture and Equipment not included in the general construction contract. The Furniture and Equipment (F&E) amount should be based upon actual anticipated expenditures and not on a % of the FLCC.
 - preparation of measured drawings of existing facilities; additional analyses, etc.
 - designer services related to owner initiated change orders. This fee should be a percentage of the actual change order cost.
- b.) Reimbursable Costs (defined by Article 12). These include payments to the designer for the actual cost of special consultants (testing, environmental, etc.) not included in the design contract and for other actual costs not included under the designer's basic services and as approved by DCAM.

4. Other adjustments:

Special conditions may require an increase or decrease in the designer fee.

15% of the total fee for the approval of schematics.

30% of the total fee for approval of design development documents.

70% of the total fee for the approval of construction documents.

100% of the total fee upon final acceptance of the project.

The last 30% of the fee is distributed proportionately throughout the construction phase.

Table I: Designers Base Fee as a Percentage of the Fixed Limit Construction Cost (FLCC) by building type for New Construction. (See note below for instructions on calculating adjustment for Renovation projects)

		Building Types				
FLCC*		I	II	III	IV	V
	<i>From</i>					
	<i>to</i>					
	\$124,999	14.0%	11.7%	10.0%	8.0%	10.6%
\$125,000	\$312,499	12.8%	10.8%	9.2%	7.5%	9.3%
\$312,500	\$624,999	11.9%	10.1%	8.5%	7.0%	7.7%
\$625,000	\$1,249,999	11.3%	9.5%	8.0%	6.6%	7.2%
\$1,250,000	\$3,124,999	11.0%	9.2%	7.7%	6.3%	6.7%
\$3,125,000	\$6,249,999	9.5%	8.0%	6.6%	5.3%	6.2%
\$6,250,000	\$12,499,999	8.5%	7.2%	5.9%	4.7%	5.9%
\$12,500,000	\$31,249,999	8.0%	6.7%	5.7%	4.5%	5.6%
\$31,250,000	\$124,999,999	7.5%	6.5%	5.5%	4.5%	5.3%
\$125,000,000	or more	7.0%	6.0%	5.0%	4.0%	

* Note: The Fixed Limit Construction Cost (FLCC) is the Estimated Construction Cost (ECC) as established in the project study adjusted to the projected mid point of construction.

Add to Fee:

- for Fixtures & Equipment (F&E) design and selection costs. (additional service)
- 0.5% for renovation projects

GROUP I	Projects of above average complexity as for example: courthouses, college building with special facilities, extended care facilities, hospitals, laboratories, specialized portions of correction facilities, and mental institutions.
GROUP II Projects of average complexity	as for example: college classroom facilities, repetitive elements of correctional and detention facilities, dining halls (institutional), fire stations, gymnasiums, laundries and cleaning facilities, office buildings (for single occupancy), park, playgrounds and recreational facilities.
GROUP III	Projects of less than average complexity as for example: armories, apartments, dormitories, exhibition halls, skating rinks, and service garages.
GROUP IV	Utilitarian buildings as for example: parking structures and repetitive garages, simple loft-type structures (without special equipment), and warehouses.
GROUP V	Repairs/renovations of limited complexity involving primarily a single discipline (engineering or architecture), i.e. roofs, masonry repairs, window replacement, mechanical/electrical plumbing work, etc.

Appendix D: Code of Conduct for Public Employees

Introduction

The Massachusetts conflict of interest law, Chapter 268A of the Massachusetts General Laws, prohibits public employees from soliciting or accepting gratuities of substantial value for or because of their official duties. The law covers all state, county, and municipal employees, as well as employees of independent state authorities, districts, and commissions. The State Ethics Commission, which enforces the conflict of interest law, is authorized to impose civil fines of up to \$2,000 for each violation of the law and to recover damages. The law also carries criminal penalties, including fines and terms of imprisonment.

The conflict of interest law encourages public agencies to establish and enforce standards of conduct. This Code of Conduct is designed to supplement the conflict of interest law by setting standards of conduct for all employees with respect to relationships with individuals and entities with whom the public sector conducts official business. The purpose of this Code is to preserve the integrity of these relationships and to maintain the highest level of public confidence in the impartial operation of government.

This Code prohibits certain activities that could result in a conflict of interest or create the appearance of a conflict of interest. Exceptions to the Code's prohibitions are limited to specific circumstances in which an overriding public interest is served by the exception or in which the relationship in question is primarily personal.

The Massachusetts Office of the Inspector General has developed this Code for use by public agencies throughout the Commonwealth. Five major areas are addressed by this Code: gifts and gratuities, reimbursement of travel expenses, honoraria, testimonial and retirement functions, and groundbreaking and dedication ceremonies. This Code is not all-inclusive. It does not regulate every conceivable situation in which a public employee may be offered gifts or other items of monetary value. It does not address other activities prohibited by the conflict of interest law, such as bribery, participation in official matters affecting one's financial interests or those of one's family or business, and misuse of one's official position. For information or advice on matters not covered by this Code, guidance may be sought from local counsel and from the State Ethics Commission. As used in this Code, "we" and "our" refer to the agency adopting this Code; "you" refers to the agency's employees or members.

(Revised 8/98)

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Code of Conduct

I. Gifts and Gratuities

A. General Restrictions

You may not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or other item of monetary value from a person, public agency, or private entity you know or have reason to know:

1. Has had, has, or is seeking to obtain contractual or other business or financial relations with us;
2. Conducts or is seeking to conduct business or other activities that are regulated or monitored by us; or
3. Has interests that may be or may give the reasonable impression of being substantially affected by the performance or nonperformance of your official duties.

Example: You may not accept a restaurant lunch from a consultant employed by a firm under contract to us.

Example: You may not accept a Christmas gift from a vendor seeking business with us.

Example: You may not accept a ticket to a sporting event from an individual whose business we regulate.

B. Exceptions

1. You may accept gifts in cases involving a family or personal relationship when the circumstances make clear that the relationship is the motivation for the gift.
2. You may accept nonalcoholic beverages, such as coffee or tea, from public or private entities.
3. You may attend and accept food and beverages at seasonal or celebratory functions, such as Christmas, birthday, or retirement parties, hosted by public entities.
4. You may accept food and beverages in connection with attendance at working meetings held in the office of a public entity.
5. You may accept food and beverages in connection with attendance at widely attended meetings or gatherings held by a private trade or

professional association in an office or other business setting when you are attending the meeting or gathering in your official capacity for informational, educational, or other similar purposes.

Example: You may accept a modest meal served in a restaurant function room in conjunction with an informational, widely attended meeting hosted by a professional association.

Example: You may not accept food and beverages at a hospitality suite hosted by one or more private firms.

6. You may accept loans from banks or other financial institutions to finance proper and usual customer activities, such as home mortgage loans and automobile loans. If the bank or financial institution is an entity with which you have or might reasonably expect to have dealings in your official capacity, you must be able to demonstrate that the loan has been granted on current customary terms; you must also provide written disclosure of the loan to your supervisor. The previous sentence does not apply if your duties or anticipated duties with respect to the bank are limited to obtaining third-party records.
7. You may accept unsolicited advertising or promotional materials of nominal value.

Example: You may accept an unsolicited, inexpensive promotional pen or calendar.

Example: You may not accept a leather portfolio.

II. Reimbursement of Travel Expenses

A. General Restrictions

You may not accept reimbursement for travel expenses from a person or entity who falls within the scope of Section IA, above.

B. Exceptions

1. If you deliver a speech or participate in a conference, we may elect to accept reimbursement from the sponsor of the speech or conference for your actual and necessary travel expenses. In this case, we – not the sponsor – will pay or reimburse you in accordance with our travel policy, and bill the sponsor for the appropriate amount.
2. If we determine that employee travel is a necessary component of a vendor evaluation process, we may elect to require competing vendors to reimburse us for actual and necessary travel expenses incurred in connection with the evaluation. In this case, we – not the vendors – will pay

or reimburse you in accordance with our travel policy. The publicly advertised request for proposals or invitation for bids must set forth our procedures for calculating and billing all competing vendors for the appropriate amounts.

III. Honoraria

A. General Restrictions

1. You may not accept honoraria or other monetary compensation from an outside source in return for a public appearance, speech, lecture, publication, or discussion unless all of the following conditions are met:
2. Preparation or delivery of the public appearance, speech, lecture, publication, or discussion is not part of your official duties;
3. Neither the sponsor nor the source, if different, of the honorarium is a person or entity who falls within the scope of Section IA, above;
4. You do not use office supplies or facilities not available to the general public in the preparation or delivery of the public appearance, speech, lecture, publication, or discussion; and
5. You do not take office time for the preparation or delivery of the public appearance, speech, lecture, publication, or discussion.

Example: You may accept an honorarium for a magazine article prepared outside working hours.

Example: You may not accept an honorarium for delivering a speech in your official capacity.

B. Exceptions

1. You may accept awards, certificates, or other items of nominal value given for a speech, participation in a conference, or a public contribution or achievement.

Example: You may accept a framed certificate of appreciation.

Example: You may not accept an engraved pewter bowl.

IV. Testimonial and Retirement Functions

A. General Restrictions⁵⁴

1. You may not solicit contributions, sell tickets, or otherwise seek or accept payment for a testimonial or retirement function, or any function having a similar purpose, held for yourself or any other employee, if the contributor is a person or entity who falls within the scope of Section IA, above, and the admission price or payment exceeds the actual per-person cost of food and beverages served at the function.

Example: You may not offer or sell tickets to a testimonial dinner to contractors doing business with us if the ticket price includes a contribution toward a gift.

2. You may not accept food, beverages, or gifts at any testimonial or retirement function, or any function having a similar purpose, if such food, beverages, or gifts are paid for or subsidized by a person or entity who falls within the scope of Section IA, above.

Example: You may not accept a free admission to a retirement luncheon if the cost of your admission is paid, directly or indirectly, by one or more contractors doing business with us.

Example: You may not accept a retirement gift if the gift was paid for with the proceeds of tickets purchased by contractors doing business with us.

B. Exceptions

None.

V. Groundbreaking and Dedication Ceremonies

A. General Restrictions

1. You may not request or require any person or entity who falls within the scope of Section IA, above, to sponsor or contribute to any groundbreaking ceremony, dedication ceremony, or similar occasion involving a public works project. If we determine that a groundbreaking or dedication ceremony for a public works project serves a legitimate public purpose, we

⁵⁴ M.G.L. c. 268, §9A prohibits anyone from selling, offering for sale, or accepting payment for tickets to, or soliciting or accepting contributions for, testimonial dinners or functions held on behalf of anyone employed by a law enforcement, regulatory, or investigatory agency of the Commonwealth or any political subdivision of the Commonwealth. The law carries a maximum fine of \$500.

may elect to fund such a ceremony. We may plan and pay for the ceremony. Alternatively, we may include the ceremony-related services in the construction bid specifications for the public works project.

2. You may not accept food, beverages, or gifts at any groundbreaking ceremony, dedication ceremony, or similar occasion involving a public works project if the food, beverages, or gifts are paid for or subsidized by a person or entity who falls within the scope of Section IA, above.

B. Exceptions

None.

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Appendix E: Model RFP for Modular Construction

This appendix includes an outline and recommended contents for a modular construction request for proposals (RFP) as well as a model RFP that you may tailor to your jurisdiction's needs. Chapter VII of this manual contains additional information on procuring modular construction.

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Modular Construction RFP: Recommended Outline and Contents

Part I. General Information

It is appropriate to include the following information in this section:

- A description of the project in general terms. The building program⁵⁵ should be summarized in this section, and the program itself should be appended to the RFP. The program summary will include, at a minimum, a description of the space needed, its function, and minimum area. The program or study will generally include site drawings showing the proposed location of the modular buildings in relationship to existing buildings and to existing utility services to which the new work can be connected, as well as the results of any surveys or tests performed on the site.
- A brief explanation of the procedure for evaluating responsive proposals and statement that the evaluation will consider only the criteria contained in the RFP.
- The rules for modification or withdrawal of proposals. Under the modular procurement law, an offeror may correct, modify, or withdraw a proposal in writing prior to the time set for opening proposals. After the proposals have been opened, an offeror may not change the price, or any provision of the proposal in a manner which is prejudicial to the awarding authority or to fair competition. [M.G.L. c. 149, §44E(4)]
- A statement that all terms and conditions of the procurement are contained in the RFP and that the contract awarded will be subject to these terms.
- A statement that the awarding authority reserves the right to reject all proposals, if it is in the public interest to do so.
- The deadline for the submission of proposals, the maximum time for acceptance of a proposal, and the maximum number of days for the completion of the required work by the selected contractor upon execution of the contract.
- Information on where to direct questions about the RFP and the deadline for submitting questions.

⁵⁵ The development of the program is part of the planning stage of a building project. The program is discussed in more detail in Chapter III.

Part II. Proposal Submission Requirements

Instructions for proposal submission should include:

- The place where proposals are to be delivered, the time and date by which proposals must be received, the time set for opening proposals, and the maximum time for proposal acceptance by the awarding authority. [M.G.L. c. 149, §44E(4)]
- A statement that late proposals will not be considered.
- The times, dates, and places of any preproposal informational meetings and site visits, and a statement clarifying whether these meetings and site visits are required for all offerors.
- A statement that every proposal must be in two parts, submitted in clearly marked, separate, sealed envelopes: non-price proposal and price proposal. [M.G.L. c. 149, §44E(4)]
- A list of all documents that must be included in the envelopes containing the non-price and price information. To facilitate the evaluation of the proposals, you may want to provide standard formats for the submission of the non-price proposal and the price proposal.

Non-Price Proposal Submission Requirements

The RFP should require proposers to include the following information in the non-price proposal:

- A Certificate of Eligibility in Modular/Prefabricated Construction and an Update Statement. [M.G.L. c. 149, §44E(4)]
- Proof of certification by the State Board of Building Regulations and Standards. This certification shows that the manufacturer meets state building code requirements.
- Plans and specifications for the proposed modular buildings. Each offeror should be required to submit drawings that show the architectural floor plans and factory details of the buildings; their interconnecting areas such as corridors, passageways, stairs, and ramps; the proposed installation plan; and all manufacturer's specifications governing the materials, equipment, and fixtures used in the buildings.
- A complete description of all warranties that apply to the building, its equipment and components, and the installation work.

- Non-collusion certification: i.e., the offeror's certification that the proposal is made without collusion or fraud. A standard form should be included in the RFP for such certification.
- Labor certification. If the contractor is required to perform any work in connection with the site preparation, site assembly, or installation of modular units, the offeror must certify that he/she is able to furnish labor that can work in concert with other elements of labor employed at the installation site. [M.G.L. c. 149, §44E(4)]
- Tax certification. Each offeror must certify compliance with state tax laws, reporting of employees and contractors, and withholding and remitting of child support. [M.G.L. c. 62C, §49A]
- Foreign corporation registration. Any out-of-state corporation must submit a certificate of registration from the Massachusetts Secretary of the Commonwealth. [M.G.L. c. 30, §39L]
- A statement that the offeror will complete the project by a stated deadline. Alternatively, each offeror can be required to submit a proposed project timetable that ensures completion by the deadline.
- The offeror's certification of where the proposed modular units are or will be manufactured: within Massachusetts, outside Massachusetts but within the U.S., or outside the U.S. [M.G.L. c. 149, §44E(4)]
- Certification of compliance with building codes. Each offeror should certify that the proposed plans comply with all applicable building codes.
- Letter of transmittal. Each offeror should submit a statement signed by an individual certifying that he/she is authorized to bind the offeror contractually, and that in the event that the offeror is selected for a contract award, the offeror will execute a contract in accordance with all terms stated in the RFP and will furnish to the awarding authority a payment bond and a performance bond, each in the sum of the contract price, as required by M.G.L. c. 149, §44E(4).

Price Proposal Submission Requirements

The RFP should require proposers to include the following information in the price proposal:

- A firm price proposal that states a total fixed project price. This proposal should contain the offeror's name, address, and telephone number as well as the title of the person submitting the proposal. It must be signed by an individual authorized to bind the offeror.
- Bid deposit. While a bid deposit is not mandated by law, the awarding authority may choose to require a bid deposit. If you choose to do so, you must require the bid deposit from all offerors. The RFP must specify the amount or

percentage of the contract price required and the form of the deposit (i.e., surety bond, cash, certified check, or cashier's check). If the bid deposit is based on a percentage of the contract price, you should require proposers to submit the bid deposit with the price proposal rather than with the non-price proposal.

Part III. Purchase Description/Scope of Services

This section should include preliminary plans and specifications and the scope of services. Preliminary plans and specifications should describe the proposed project in sufficient detail to permit proposers to submit meaningful, competitive proposals. The level of design detail will likely resemble a schematic design. The specifications should avoid the use of proprietary brand names or other unnecessarily restrictive terms. Whenever possible, specifications for construction materials, fixtures, and systems should be stated in terms of testing standards that measure qualities such as strength, durability, capacity, flammability, and R-value.⁵⁶

This section of the RFP should also specify the scope of services to be included in the modular construction contract. You will have to decide at the outset whether to include site preparation and installation work in the RFP, to contract separately for some or all of this work under the construction bid laws, or to have the work performed by qualified employees. This section of the RFP should fully describe the contractor's responsibilities with respect to preparing the site; constructing foundations, ramps, stairs, and connecting corridors; assembling and installing the modular units at the site; attaching the units to existing utilities; obtaining all necessary plan approvals and permits, including building permits, permits required for transporting modular units from the factory to the site, and occupancy permits; removing all debris from the site upon completion; and any other required services. If the RFP calls for the lease of modular buildings, the scope of services should include the contractor's responsibilities for removal of the units at the end of the lease term and restoration of the site to its original condition.

⁵⁶ R-value, or resistance value, is the measure of the resistance of a building material to heat flow; the higher the R-value, the greater the resistance.

Part IV. Evaluation Criteria

This section must include criteria for determining the acceptability of a proposal based on quality of materials, workmanship, results of inspections and tests, suitability for a particular purpose, and all other measures to be used in the evaluation process.

In developing your evaluation criteria, avoid the use of vague standards like “general quality of construction and appearance” or “reasonableness of technical approach,” which provide little guidance to offerors or to evaluators. Proposals should be compared and evaluated on the basis of specific and concrete factors that are closely related to your project requirements. We recommend using evaluation criteria such as the following:

- The contractor’s qualifications to perform the work, to be evaluated on the basis of the contractor’s performance on other modular projects.
- The quality of the proposed modular building.

Part V. Contract Terms

The RFP must contain all of the contract terms and provisions applicable to the modular procurement. Your local attorney can assist you in developing a modular construction contract, which will resemble a conventional construction contract in most respects. The contract will be a complex document, and a discussion of all of the terms is beyond the scope of this manual. Nevertheless, you should be aware of the following specific provisions:

Prevailing wages and hiring preferences. The modular procurement law exempts the work involved in the manufacture of modular buildings from the state laws requiring payment of prevailing wage rates and hiring preferences for veterans and residents of Massachusetts. [M.G.L. c. 149, §§26-27G] However, these exemptions do not apply to the work performed on modular buildings at the building site. Any contract that includes site work (such as construction of foundations, attachment to utilities, or installation and assembly of modular units) must contain provisions regarding these legal requirements. Note that the awarding authority must obtain

the prevailing wage rates applicable to the project from the Department of Labor and Workforce Development prior to issuing the RFP, and these rates should be included in the RFP.

Adjustments. The contract is subject to certain statutory provisions governing price adjustment. [M.G.L. c. 30, §§39N-O] The contract should also include terms governing the adoption and pricing of change orders.

Performance and payment bonds. The contract must include a provision requiring the selected offeror to furnish the awarding authority with a payment bond and a performance bond issued by a surety qualified to issue bonds in the Commonwealth and satisfactory to the awarding authority, each in the sum of the contract price. [M.G.L. c. 149, §44E]

Foreign corporations. Any contractor incorporated outside of Massachusetts must certify compliance with certain corporation laws. The awarding authority must notify the Secretary of the Commonwealth and the Department of Revenue whenever a contract is awarded to an out-of-state corporation. [M.G.L. c. 30, §39L]

Payment procedures. The contract must contain statutory language governing payment procedures. [M.G.L. c. 30, §39K]

Financial reporting. Contractors must agree to keep certain financial records, make them available for inspection by certain state agencies, and file periodic financial reports. [M.G.L. c. 30, §39R]

Auditor's certification. For a city or town, the contract must contain a certification by the municipal auditor or accountant stating that appropriated funds are available for the contract and that the official signing the contract has been authorized to do so. The certification should also identify any other municipal officials who have been authorized to make decisions under the contract, such as approval of change orders and invoices. [M.G.L. c. 44, §31C]

Liability insurance. The awarding authority may either require the contractor to provide project insurance, covering both the contractor and the awarding authority, or it may arrange to insure itself separately.

Tax compliance. Any person contracting with the Commonwealth of Massachusetts or any subdivision of the Commonwealth, including a city, town or district, must certify in writing that he or she has complied with state tax laws, reporting of employees and contractors, and withholding and remitting of child support. [M.G.L. c. 62C, §49A]

Liquidated damages. You may want to include a provision for imposing liquidated damages⁵⁷ on the contractor for late completion.

⁵⁷ Liquidated damages represent the dollar damages your jurisdiction will incur in the event of a breach of contract.

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Model Request for Proposals for Modular Building Construction

Part I. General Information

Pursuant to M.G.L. c. 149, §44E(4), _____ requests proposals from qualified contractors for the design, prefabrication, site assembly/installation, and all services required to complete and deliver _____ modular building units ready for use and occupancy.

[This section will include a description of the space needed, its function, minimum area, and any special requirements. This section will also refer to the program, which should be appended to the RFP.]

All proposals are to be submitted no later than the deadline stated in Part II, "Proposal Submission Requirements," and the non-price proposals will be opened at that time. Every proposal must be in two parts, submitted in two separate, clearly marked, sealed envelopes: 1) non-price proposal, and 2) price proposal, in accordance with all submission requirements set forth in Part II of this RFP. **Late proposals will not be accepted.**

Each proposal submitted in response to this RFP is subject to all of the contract terms set forth in Part V, "Contract Terms," and any contract awarded will incorporate all of these contract terms.

_____ will consider only responsive proposals from responsible contractors for a contract award. A responsive proposal is a proposal that complies with requirements stated in Part II and Part III of this Request for Proposals (RFP). A responsible contractor is a contractor that demonstrably possesses the skill, ability, and integrity necessary to faithfully perform the work called for in this procurement.

Each responsive proposal from a responsible contractor will be evaluated solely according to the criteria set forth in Part IV of this RFP, "Evaluation Criteria." Each non-price proposal will be assigned a rating of *highly advantageous*, *advantageous*, *not*

This document is a model RFP for Modular Building Construction. The [bracketed] information is provided as instructions and should not form the text of an RFP.

advantageous, or *unacceptable* with respect to each criterion, and the reasons for each rating will be set forth in writing. A composite rating for each non-price proposal will be set forth in writing, along with the reasons for the rating. The evaluation committee will determine the most advantageous proposal from a responsible and responsive offeror, taking into consideration the non-price proposal ratings and proposal price. If the contract is awarded to an offeror that did not submit the lowest price, the evaluation committee will set forth a written explanation of the reasons for the award.

In determining the most advantageous proposal, _____ shall give preference, other considerations being equal, first to modular buildings manufactured within Massachusetts, and second to modular buildings manufactured outside of Massachusetts but within the United States.

Proposals will not be opened publicly, but will be opened in the presence of one or more witnesses at the time stated below. The contents of proposals shall remain confidential, and shall not be disclosed to competing offerors until the completion of the evaluation or until the maximum time for acceptance, as stated below. At the opening of proposals, _____ shall prepare a register of proposals for public inspection.

An offeror may correct, modify, or withdraw a proposal by written notice received in the office designated herein for proposal submission prior to the time set for the opening of proposals. After the opening, a contractor may not change the price or any other provision of the proposal in a manner prejudicial to the interest of _____ or to fair competition. _____ shall waive minor informalities or allow the offeror to correct them. If a mistake and the intended offer are clearly evident on the face of the document, _____ shall correct the mistake to reflect the intended correct offer and so notify the offeror in writing, and the offeror may not withdraw the offer. _____ may permit an offeror to withdraw an offer if a mistake is evident on the face of the document but the intended correct offer is not similarly evident.

_____ reserves the right to cancel this procurement at any time before a contract is executed and approved, in which event _____ will reject all proposals received in response to this RFP.

This document is a model RFP for Modular Building Construction. The [bracketed] information is provided as instructions and should not form the text of an RFP.

_____ shall award a contract by written notice to the selected offeror by no later than _____, unless the time for contract award is extended by mutual agreement between _____ and the selected offeror.

Work is to start ____ days from the date of notification of award under this RFP, and the contractor's performance under the contract must be completed within ____ days from the date of notification of award.

All inquiries from prospective offerors concerning this RFP must be submitted in writing and addressed to _____. Inquiries must be received no later than _____. All responses to questions shall be in writing, will be simultaneously distributed to all recipients of the RFP, and will be made available to all interested parties.

Part II. Proposal Submission Requirements

[This section will include instructions for submitting a responsive proposal. It should list all documents and information that each proposal must contain.]

All proposals are to be delivered to _____, no later than ____ a.m. on _____. Non-price proposals will be opened at that time. _____ will select a contractor no later than _____. **Late proposals will not be accepted.**

[If a mandatory pre-proposal meeting and/or site visit is required, the following information must be provided.]

A pre-proposal meeting will be held at _____ on _____ at ____a.m.

Attendance at this pre-proposal meeting is mandatory, and any proposal submitted by an offeror who was not present at this meeting will be rejected as nonresponsive.

All offerors are required to visit the site before submitting a proposal. Submission of a proposal constitutes an acknowledgement that the offeror has examined the site and is familiar with existing conditions.

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Every proposal must be in two parts, submitted in separate, clearly marked, sealed envelopes: 1) non-price proposal and 2) price proposal.

The following information must appear on each envelope:

Contractor's Name:

Project Name:

Either "Non-Price Submission" or "Price Submission"

The **non-price proposal** must consist of the following documents:

1. Current Certificate of Eligibility for Modular/Prefabricated Construction.
2. Contractor Update Statement.
3. Certification by the State Board of Building Regulations and Standards that the manufacturer of the modular buildings meets state building code requirements.
4. A set of detailed plans and specifications for the proposed modular buildings. Proposals must include all manufacturer's specifications governing the materials and equipment used in the modular buildings. The plans submitted with each proposal must provide all drawings necessary to portray to _____ all pertinent design details of the modular buildings and the passageways connecting them to existing buildings, including:
 - an installation plan showing the proposed accurate location of the modular buildings on the property; an indication of the locations on the modular buildings at which utility service connections are proposed; and locations of existing utility services to which the proposed modular buildings can be connected.
 - mounting plans and details.
 - architectural type floor plans.
 - factory plans and details of passageway elements and entrance ramps.
 - factory plans and details of manufacture of structural elements including floors, walls, and roof.
 - factory plans and details of service appurtenances including electrical, plumbing, HVAC, fire protection, and communications systems. Such details must include all light fixtures, outlets, switches, controls, smoke detectors, and location and capacity/rating of all equipment, fixtures, and appliances.
 - factory details of windows and doors.
 - factory finish details for wall finishes, floor finishes, exterior skin finish, and trim.
5. The complete terms of all warranties provided by the manufacturer or by the offeror relative to the design, manufacture, and installation of the modular buildings,

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including both general warranties and special warranties associated with particular components and equipment.

6. Certification of financial interest disclosure and of non-collusion, signed and submitted on Form _____ appended to this RFP.
7. Certification that the offeror can furnish labor that can work in concert with other elements of labor employed at the installation site, signed and submitted on Form _____ appended to this RFP.
8. Certification of compliance with the registration requirements for foreign corporations, under M.G.L. c. 30, §39L, signed and submitted on Form _____ appended to this RFP.
9. Certification of compliance with state tax laws, reporting of employees and contractors, and withholding and remitting of child support, as required by M.G.L. c. 62C, §49A, signed and submitted on Form _____ appended to this RFP.
10. Certification that the proposed modular buildings will be either (1) manufactured within Massachusetts, or (2) manufactured outside of Massachusetts but within the United States, or (3) manufactured outside of the United States, signed and submitted on Form _____ appended to this RFP.
11. Certification that the proposed modular building plans comply with all building codes.
12. Letter of transmittal, signed by an individual authorized to bind the offeror contractually, certifying that the offeror will, if accepted for a contract award, execute a contract in accordance with the terms of this proposals within ____ working days of the notice of award and will furnish to _____ a payment bond and a performance bond, each in the sum of the contract price, as required by M.G.L. c. 149, §44E, signed and submitted on Form _____ appended to this RFP.
13. Certification that the offeror, if awarded a contract, will guarantee completion of all work required within ____ days from the date of notification of award, signed and submitted on Form _____ appended to this RFP.

The **price proposal** must consist of the following documents:

1. A firm, fixed price that includes the furnishing of all materials, services, labor, performance and payment bonds, insurance, and other costs incurred in the performance the contract, signed by an individual authorized to bind the offeror contractually, and submitted on Form _____ appended to this RFP.
2. A bid deposit, in the amount of _____% of the total contract price, in the form of _____ [if required by the awarding authority].

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Part III. Purchase Description/Scope of Services

The contractor's responsibilities will include all of the following:

[This section will refer to the preliminary plans and specifications, which should be appended to the RFP. This section will also completely describe the scope of the work under the contract, which may include some or all of the following work:

- design and fabrication of modular units in accordance with all specifications set forth in this RFP and all program requirements and applicable building codes.
- site design in accordance with all specifications set forth in this RFP and all program requirements and applicable building codes.
- all site clearance and site preparation work, including grading, tree and stump removal, and relocation of power lines and underground utilities, if required.
- all excavation work and construction of foundations in accordance with the plans and specifications set forth in this RFP.
- delivery of all modular units and construction materials to the construction site.
- acquisition of all permits required for the transportation of modular units from the factory to the construction site.
- acquisition of all required building permits.
- complete installation and assembly of modular units in accordance with all plans and specifications set forth in this RFP and all applicable building codes.
- connection of all electrical, telecommunication, water, and sanitary service in accordance with the plans and specifications set forth in this RFP.
- acquisition of all use and occupancy permits.
- finish grading and removal of all debris from the site.
- all repairs and corrective work required by applicable warranties.

Specifications should be prepared with close attention to the RFP requirements and state building code requirements for:

- foundations, or concrete footings, anchoring and skirting.
- exterior stairs, entrance ramps, and corridors.

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- floors: joists, bottom board, insulation, subflooring, weight load capacity, and floor coverings.
- walls: studs, insulation, composition, siding, weight load capacity, wind load capacity, ceiling height, sound proofing, and interior finishes.
- roof: composition, sheathing, framing, weight load capacity, pitch, insulation, eaves and downspouts, and ceiling materials.
- doors: number, size, construction of frames, materials, weatherstripping, and lockset and hardware details.
- windows: number, size, construction of frames, glazing, weatherstripping, screens, and lock and hardware details.
- HVAC systems: functional requirements for and description of heating, ventilation, and cooling systems.
- plumbing: requirements for supply, waste, and vent lines, and fittings; size, type, and capacity of water heaters; and description of plumbing fixture requirements, including sinks, water closets, and water fountains.
- electrical systems: service requirements, capacity, and outlets.
- lighting: illumination requirements and type of fixtures.
- fire protection: alarms, smoke detectors, and sprinkler systems.
- miscellaneous: communication systems, exit signs, tack boards, chalkboards, and special features.]

Part IV. Evaluation Criteria

Non-price proposals that meet all of the submission requirements in Part II of this RFP will be evaluated and rated solely on the basis of the evaluation criteria contained in this section. Each responsive non-price proposal will be assigned a rating for each of the following evaluation criteria:

[This section must include all criteria by which proposals will be evaluated. The following categories of criteria are recommended for a typical modular procurement.]

1. The offeror's qualifications to perform the work, to be evaluated on the basis of performance on past and current projects. Projects will be evaluated according to:

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- Quality of work and compliance with construction specifications.
 - Adherence to project budget.
 - Compliance with project schedule.
2. The quality of the proposed manufactured building, to be evaluated on the basis of the specifications contained in the proposal and references from owners or users of similar buildings fabricated by the same manufacturer.

In evaluating each non-price proposal, the evaluation committee shall assign a rating of *highly advantageous*, *advantageous*, *not advantageous*, or *unacceptable* for each of the criteria. The evaluation committee may identify any revisions necessary to change a rating on a criterion from *unacceptable* to *advantageous* and shall specify such changes in writing.

The evaluation committee shall assign a composite rating of *highly advantageous*, *advantageous*, *not advantageous*, or *unacceptable* for each non-price proposal. Each composite rating shall be justified in writing. After a composite rating has been assigned for each proposal on the basis of the evaluation criteria in this section, the evaluation committee shall review the price proposals and determine the most advantageous proposal, taking into consideration the non-price proposal ratings and the price. If the evaluation committee selects a proposal other than the lowest-priced proposal, the evaluation committee shall explain in writing why the added benefits of the proposal justify its higher price. The award of a contract to any offeror whose non-price proposal was rated *unacceptable* with respect to one or more criteria will be conditioned on the negotiation of the revisions recommended by the evaluation committee at no increase in the proposed price.

Part V – Contract Terms

[All contract terms and conditions must be included in the RFP. We recommend that your local attorney develop a standard modular construction contract for your jurisdiction, incorporating the contract provisions discussed earlier in this appendix. You may not negotiate material changes to substantive contract terms.]

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Any contract awarded on the basis of this RFP will be subject to the contract terms in this section.

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